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ABRIDGMENT
OF THE LAW OF
PERSONAL PROPERTY

J. A. SHEARWOOD.

Cw. U.K.

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A
CONCISE ABRIDGMENT
OF THE
LAW OF PERSONAL PROPERTY

SHOWING ANALYTICALLY ITS BRANCHES AND THE TITLES
BY WHICH IT IS HELD.

BY

JOSEPH A. SHEARWOOD,

OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW, 1ST CLASS CERT. HON. 1869.

AUTHOR OF

"CONCISE ABRIDGMENT OF REAL PROPERTY;" "BAR, SOLICITOR'S FINAL, AND UNIVERSITIES
EXAMINATION GUIDE;" "OUTLINE OF CONTRACTS;" "DIGEST OF THE QUESTIONS
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"TABULAR ANALYSIS OF TRUSTS."



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PREFACE.

THIS work is written with a view of being a companion volume to the Author's "Concise Abridgment of Real Property." It merely consists of the headings of the subject, its compass being insufficient to admit of lengthy explanations. The endeavour is to present personal property in an arranged and classified form, so as to facilitate the perusal of more compendious treatises, and further to serve as a summary of the law to students when going up for examination.

J. A. S.

2, MIDDLE TEMPLE LANE, E.C.
December, 1881.

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ABBREVIATIONS.

J. A.	Judicature Act.
R. S. C.	Rule of Supreme Court.
C. L. P. A.	Common Law Procedure Act.

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PART I.

DIVISIONS OF PERSONALTY.

PERSONAL PROPERTY,

ITS GROWTH, HISTORY, AND KINDS.

INTRODUCTION.

THE terms "personal property" and "chattels" are *Chattels*. synonymous. *Chattels*, according to Coke, is a French word, signifying goods, and derived from the Latin *catalla*; this strictly means "cattle," but was also applied to all moveables. The term "personal," according to Coke (*Co. Litt.* 118*b*), is used, either because the articles belong to the person of a man, or because they are recovered by personal actions. Blackstone (2 *Bl.* 16, 384) is in favour of the first reason, while the late Mr. Joshua Williams (*Wms. P. P.* 11 *ed. p.* 2) submits that the latter is the true one, on the ground that, when the term "personal" was first applied to chattels, they had become too numerous to accompany the persons of their owners; and further, that as litigation has always been the principal business of lawyers, legal nomenclature is probably derived from the different names of actions; and that for long personal actions have been brought in respect to goods with a view to obtain damages against the person—goods being in their nature destructible, and hence nothing else with certainty recoverable—while real actions lay for the recovery of land, as that could not be made away with.

Little attention was paid to personal property by the legislature during the Norman and Plantaganet periods, and they were not included in any of the great statutes

relating to real property, and hence the law relating to the two branches of property has been historically distinct. For goods, money, and chattels generally were held in small esteem in the days of chivalry, because they savoured of barter and commerce—a pursuit despised by men of spirit in those military times—and more, because moveables and consumables were in a state of permanent insecurity. Money, again, was scarce; stocks, shares, and securities totally unknown; land and its proceeds being almost alone of value. When the country became more settled, and the discoveries of navigators opened communications with other countries, and the encouragement afforded to manufactures facilitated the growth of large towns, things personal increased in number, value, importance, and variety, and have so continued to increase proportionally with the wealth and prosperity of England, that the law concerning them is now far more important than that of land, the ownership of which is centred in a comparatively small number of persons.

The tendency of modern legislation is to assimilate the Law of Realty and Personality.

Differences
between
things
real and
personal.

The main differences between the two now are—

1. That realty on intestacy passes to the heir, and personality (with a few exceptions, *see c. 7*) to the next of kin, in the order laid down by the Statutes of Distribution (*see post, c. 6*).

2. That realty on testacy goes directly to the devisee, and personality to the executors.

3. That realty is held by estates, and incapable of absolute ownership, the sovereign being lord paramount of all the land in England, while in personality there can be no estates, and the proprietorship is capable of being absolute.

4. That realty is alienated *inter vivos* by conveyance, and the seisin must pass to the alienee in order to make him the recognised owner at law, there being a distinc-

tion between the legal and the physical possession; whereas personalty is transferable by actual or constructive delivery.

5. There are many more differences arising from the distinctive natures of the two, and from the principles of common law, and from the statutes respectively applicable to each of them.

Chattels are either **chattels real** or **chattels personal**. Classification of chattels.
 The former consist of those which are connected with land, in that they are immoveable; but they are not of uncertain duration, as land, and if enduring beyond the life of the owner, do not pass to his real representative. 1. Chattels real
 Leaseholds may be cited as the most conspicuous example of these. In the feudal ages, as a life estate was the smallest interest which a free man would accept—terms for a fixed number of years were unknown, yearly leases to inferior persons for the purposes of agriculture alone being in use—an interest of this nature only gave to the lessee a personal remedy against the donor in the event of eviction, and not an action against the evictor for the recovery of the land: hence, the lease was held to be a chattel interest merely; and though leaseholds have since sprung into such importance, and are so closely identified with the land itself, yet their legal position is unchanged, excepting where a few statutes have classed them with realty, for the purposes for which those Acts were passed. The right of the next presentation to a church on a vacancy and estates by *elegit* are also chattels real. These are treated of in the author's "Concise Abridgment of Real Property," to which the reader is referred.

Chattels personal consist of **choses in possession** or **in action**; they are in possession when the owner has them under his control, and in action when he has merely a right to sue for their reduction into possession, or to maintain an action in consequence of some detention of or injury to them, or in relation to some matter personal. and chattels personal.
2. In possession and in action.

3. Corporeal and incorporeal. They may further be divided into corporeal and incorporeal, the latter being a species of property entirely unknown in early times, but which, during the present century, has risen to become of the first importance: stocks, shares, and annuities are the most familiar illustrations of it, as the scrip, bonds, &c., which represent these merely confer the right to obtain the money or dividends. All stocks and shares are said to be incorporeal personalty, the bonds or certificates being evidentiary of the ownership. Therefore things incorporeal are almost analogous to choses in action, but they are not quite the same; indeed in many cases the possession of the scrip, &c., will not even confer a right of action, *e.g.*, in Government stock.

The differences depending on the fact whether a chattel is a chose in action or a chattel incorporeal are—that there is nothing to prevent the assignment of incorporeal personalty; while a chose in action can, with a few exceptions, only be assigned at law in the manner laid down by J. A., 1873, s. 25, sub-s. 6.

Again, it has been held that shares in a company are not things in action under s. 15, sub-s. 5, of the Bankruptcy Act, 1869 (*Ex parte Union Bank of Manchester; In re Jackson*, L. R. 12 Eq. 354), which provides that things in action are not to be considered in the order and disposition of the bankrupt, being a trader. *Secus*, a policy of life assurance (*Ex parte Ibbitson*, L. R. 8 Ch. D. 519).

Again, a husband must take out letters of administration to reduce the wife's choses in action into possession. This is not necessary for incorporeal personal property.

4. Varieties of possession. The possession of choses in possession may be absolute or qualified, sole or collective.

5. Possession and expectancy. Personalty may also be in possession or expectancy. Thus, if a sum of money is bequeathed to trustees to pay the interest to A for life, and then to hand it over to B, B's interest is in expectancy. It is not a chose in action,

for he has no immediate right of action; but still his interest is of an assignable and devisable nature.

Personalty may be further classified as existing either ^{6. Legal and equitable.} in contemplation of law or in contemplation of equity only; for in some cases the right of persons in property is considered real at law and personal in equity; and this is sometimes in consonance with the doctrines of general equity, and sometimes for the sake of commercial and general convenience. Thus, realty purchased by partners for partnership purposes is personalty in equity.

Lastly, personalty may be divided into pure and impure, ^{7. Pure and impure.} the latter consisting of certain chattels which pass with the realty to the heir, and thus form an exception to the first difference between realty and personalty, stated on p. 4.

CHAPTER I.

THINGS CORPOREAL.

Things
corporeal.

Things corporeal consist of—

1. All inanimate things, as furniture, goods, clothes, vegetable productions, which may be either emblements, or products of the land, which are not emblements, when severed from it.

2. Animals, which are

1. Tame, in which case the ownership is absolute.

2. Wild, as game. &c., in which case the property is qualified or temporary only, arising either

a. Per industriam (when caught or tamed), in which event it continues until they escape, or relapse into their normal state.

β. Per impotentiam, when the animal is so young or weak that it cannot escape, in which event the property lasts until it does escape.

γ. Per privilegium, when a person is privileged to kill and take them, to the exclusion of others, in which event it lasts as long as the privilege continues.

. Ships.

Ships form an important branch of things corporeal.

The law as to ships is regulated principally by the Merchant Shipping Act, 1854 (17 & 18 *Vict. c. 104*).

Who can
own a

(i) A natural born subject, not having taken the oath of allegiance to a foreign sovereign, unless,

indeed, he has afterwards taken it to the Queen, ^{British} and resides or belongs to a firm trading in the ^{ship.} British dominions ;

- (ii) A denizen, or person naturalized by Act of Parliament, resident or belonging to a firm carrying on business, or a body corporate having its head office in the British dominions, can alone own a British ship, and assume the national flag, and claim the protection it affords, which it can do by being registered at any British port. Coasting vessels under fifteen tons need not be registered.

The property in a ship is divided into sixty-four parts, ^{Property in ships.} of which sixty-four persons can be registered as owners (43 & 44 *Vict. c. 18*), though there may be any number of persons beneficially interested, and claiming through the registered owners. No person can be registered as part owner, neither can trusts be entered on the register ; but five persons or less can be registered as joint owners, or of any share or shares, but they cannot dispose of their respective interests in severalty (17 & 18 *Vict. c. 104, s. 103*). Bodies corporate are registered in their corporate names.

A part owner is liable, like a partner, for all expenses incurred, unless he can show that such expenses were not incurred to his own credit (*Chappell v. Bray*, 6 *H. & N.* 145).

Co-owners usually elect one of their body to manage the ship, and style him the ship's husband. His powers are generally determined by special agreement.

Ships, or shares therein, are transferred by bill of ^{Transfer.} sale under seal (*s. 55*), attested by one witness, and registered at the port of register (*s. 57*) ; but mere registration will not give a title to a person not absolutely entitled, for he will be compelled in equity to execute a retransfer to the real owner, accounting for the *mesne* earnings. The

certificate of registry is only to be used for the navigation of the ship, and cannot be detained because of any lien or other charge.

The form of a mortgage is prescribed by s. 66, sched. I. It must contain all particulars, be under seal, attested and registered; and the priority of several mortgagees ranks according to the date of the registration of their mortgages, independently of any notice they may have had (s. 69). The mortgagee is entitled to the possession of the ship, or share of all its earnings, subject to legal liens; but the mortgagor remains owner until possession is taken, and contracts by him for the employment of the vessel bind the mortgagee, subject to the security of the mortgage being unimpaired (s. 70).¹

There are two contracts in shipping law, which may be briefly noticed here.

Bottomry. **Bottomry** is a contract whereby a ship is hypothecated as security for money advanced for her use, and the interest thereon. If the cargo is hypothecated instead of the ship, the contract is termed **Respondentia**. These contracts have always differed from ordinary ones in that—

Respondentia.

1. The lender's money is at hazard during the voyage, he getting nothing if the ship in the one case, and the cargo in the other, is lost (*Stainbank v. Fenning*, 11 C. B. 81).

2. Owing to the risk, it has always been allowed to reserve any amount of interest.

3. If there are several of these contracts, and the proceeds of the sale of the vessel cannot pay all, the last is paid first, the presumption being that it was the last loan which saved the ship, for the master can borrow money in this way at foreign ports, in case of necessity, and for furtherance of the voyage.

¹ All instruments relating to duty. (17 & 18 Vict. c. 104, ships are exempt from stamp s. 9.)

CHAPTER II.

THINGS INCORPOREAL.

THE Crown has the prerogative of granting to the in- **Patents.**
 ventor (not his assignee or communicatee) by letters patent
 the exclusive right of making, dealing with, and profiting
 by, new inventions, for fourteen years or less (21 *Jac. I. c. 3*,
s. 6)—the question of previous *public* user (not discovery)
 being the test as to whether the invention is new or not.
 The fact of an invention, however, being discovered
 abroad, and a patent being taken out there, does not prevent
 a patent being obtained here for the same invention, but
 the right here ceases when the right or the first of such
 rights obtained there cease (15 & 16 *Vict. c. 83, s. 25*).

The Patent Law Amendment Act provides (16 & 17
Vict. c. 5, s. 2) that all letters patent for inventions
 granted under it shall be void at the end of three years,
 unless £50 stamp duty is paid by then, and at the end of
 seven years unless £100 stamp duty is paid by then.

Also, the inventor or his assignee may obtain an exten-
 sion of the privilege for seven years or less (5 & 6 *Will.*
IV. c. 83, s. 4), or even for fourteen years (7 & 8 *Vict.*
c. 69, ss. 2, 4), on the Judicial Committee of the Privy
 Council reporting to the sovereign that there is reason
 for it, as, for instance, that having the monopoly for a less
 period does not sufficiently repay him.

A patent is obtained by petition to the Crown, sup-
 ported by a declaration that the petitioner is the true and

first inventor. These are deposited at the Board of Commissioners for Patents, and with them the **Provisional Specification** describing the nature of the invention. On one of the law officers of the Crown being satisfied, the invention may be used for six months from the application, without prejudice to any letters patent being afterwards granted. A "complete" instead of a "provisional" specification may be filed with the petition, an additional statement being inserted that the instrument particularly describes the nature of the invention, and how the same is to be performed, and then the applicant shall have, during the six months, the same powers as might have been conferred on him by letters patent at the date of the application. The **Specification** should fully describe the whole secret, the object of it being to enable any person to avail himself of it when the period of the exclusive privilege has expired (*R. v. Wheeler*, 2 B. & A. 345); and therefore it is bad if so obscurely worded that persons in the same trade cannot understand it. The applicant then gives notice at the Office of the Commissioners of Patents of his intention to proceed; his application is advertised, and when the period for taking objections has expired, the specifications and the objections are referred to the law officer; who, if he thinks fit, may cause a warrant to be made for the sealing of the letters patent, which is now prepared by the Clerk of the Crown in Chancery (43 & 44 *Vict. c. 10*), and having been sealed by the Commissioners, the Lord Chancellor causes it to be sealed with the Great Seal.

Letters patent are assignable, and a deed is invariably used for this purpose. Letters patent and all assignments of them are registered. They now extend to the United Kingdom and Channel Islands, including the Isle of Man.

Copyright. Copyright is the exclusive privilege of printing, publishing, and selling particular original works of literature.

It only exists by statute (*Reade v. Conquest*, 30 *L. J. C. P.* 213). The originality consists in sentiment and language; for the same conceptions, clothed in different words, belong to the same composition. But a *bond fide* abridgment is considered a new work—as is also such variation in form and manner as to constitute an improvement. The question as to originality is one for the jury. There is no copyright in improper or defamatory productions, nor in advertisements or illustrations contained therein, nor in catalogues of books for sale (*Layland v. Stewart*, 46 *L. J. Ch.* 103); and dramatising and representing a novel on the stage is not an infringement of copyright.

By 5 & 6 Vict. c. 105, copyright endures for the life of the author, and for seven years after; but if the seven years expire before forty-two years it shall last for forty-two years; also, if published after the author's death, it shall last for forty-two years, and belong to the proprietor of the author's manuscript. It may be assigned in writing, and, if entered in the registry book at Stationer's Hall, it will be as effectual as if by deed. Being personal property it has always been bequeathable.

An agreement between an author and publisher, that the latter is to print and publish the work at his own risk, and the profits, &c., are to be shared, is not a sale of copyright, but a mere personal contract and not assignable (*Stevens v. Benning*, 1 *K. & J.* 174), a complete change in the firm of publishers terminating it (*Hore v. Bradbury*, 48 *L. J. Ch. D.* 673).

By 7 & 8 Vict. c. 12, the authors of works published abroad may, by order in Council, have copyright for the above-mentioned periods in those works here; they may also prevent unauthorized translations being published here for such time as allowed by the Royal mandate, not exceeding five years from the time in which authorized translations shall be first represented.

The author of any original painting, drawing, or photograph has the sole right of copying, reproducing, and multiplying the design for his life and seven years after; on sale of the object he does not retain the copyright, unless by special agreement in writing (25 & 26 *Vict. c. 68*).

Trade
marks.

A manufacturer of goods may bring an action against anyone who uses his trade mark, and sells goods with it affixed (*Rodgers v. Nowill*, 5 *C. B.* 109). An injunction, however, will not be granted on the ground of general resemblance, there being a difference in those points a person should pay attention to, to see whose article he was buying. A trade mark may consist in the name of a place, *e.g.*, "Glenfield" Starch (*Wotherspoon v. Currie*, 42 *L. J. Ch.* 130), but not a mere English or foreign word, or one denoting the quality of the article, *e.g.*, "Nourishing Stout" (*Roggatt v. Findlater*, 43 *L. J. Ch.* 64).

By the Trades Marks Registration Acts of 1875 (38 & 39 *Vict. c. 91*), 1876 (39 & 40 *Vict. c. 33*), and 1877 (40 & 41 *Vict. c. 37*), a trade mark may consist of the name of a person or firm printed, impressed, or woven in some particular manner, or a written signature or copy thereof, or a distinctive device, mark, label, or ticket, and there may be added to the above any letters, words, or figures, or combination thereof, &c. They establish a registration, and no proceedings can be instituted to recover damages for the infringement of a trade mark until or unless it is registered, or with respect to any mark in use before the passing of the Acts registration is refused. Registration is refused if it so nearly resembles a trade mark for the same class of goods as to be calculated to deceive. Registration as first proprietor shall be *prima facie* evidence of the right of exclusive use of the proprietor to the mark, and, after five years from date, shall be conclusive evidence of it; such right is assignable with the goodwill of the business under which it is registered.

A **personal annuity** is an annual payment to a person. Personal annuities. It resembles real estate in that it may be made to a man and his heirs or the heirs of his body, in which case, if he does not divert it into another channel by assignment, it will descend on his death as a similar gift of real property would do, the grantee having a fee simple interest and the subject-matter being a hereditament. It is not, however, capable of being entailed, the Statute de Donis (*see the author's "Real Property," p. 15*) applying to things capable of tenure only; therefore the interest of the grantee, when the annuity is given to him and the heirs of his body, is a fee simple conditional on his having issue. On the birth of issue he can assign the fee, and, if he dies without issue living, it will cease on his death (unless he has previously assigned it when his issue were living). If given to him, "and his executors," or "assigns," or "for ever," he will have a life interest only (*Earl of Stafford v. Buckley, 3 Ves. 171*).

Annuities are also for life or for years. They arise frequently from the same necessity as life insurances—the inability of the borrower to give the lender a permanent security for money advanced. He therefore pays yearly a sum varying in amount according to the loan and the chance of his death, the grantee insuring his life and paying also the annual insurance.

The National Debt Commissioners may receive money from depositors in Savings Banks for the purchase of annuities (16 & 17 *Vict. c. 42*). These Government annuities are only assignable on bankruptcy. Other annuities have for a long while been freely assignable.

Stock in the funds consists of permanent annuities payable half-yearly for ever, the Government having a right to redeem them on payment of the sum originally borrowed, of which the annuity represents the interest. These annuities are to all intents and purposes personal estate, and not descendible to heirs (1 *Geo. I. c. 19, s. 9*).

There are several British Government Stocks, the number and amount of which have been increasing concurrently with the prosperity of the country. The most important is the 3 per Cent. Consolidated Annuities, commonly termed **Consols**, which originated in 1751, when several descriptions were consolidated into one, bearing a uniform rate of interest of 3 per cent. per annum for every £100. In 1751, it amounted only to £9,137,812, but in 1866 it stood at £398,147,075, including the Irish 3 per Cent. Consols.

Other stocks are the—

Reduced 3 per Cent. Annuities (formed at the same period).

New 3 per Cent. Annuities (formed in 1830).

New $3\frac{1}{2}$ per Cent. Annuities (1853).

New $2\frac{1}{2}$ per Cent. Annuities (1853).

Annuities for terms of years, expiring at various dates.

Annuities terminable 1885.

Life Annuities.

Debt due to the Bank of England, which was established in 1694 with a view to advance money to the Government.

Transfer. The legal ownership in stock is transferred by signature of the Bank of England books (as the Act 1 *Geo. I., c. 19, s. 11*, lays down) by the transferor or attorney appointed by deed and attested by two witnesses. Joint ownership of four or less are permitted, but trusts cannot be put down. Therefore, equitable interests can be assigned in the same manner as other equitable interests in personalty; and an equitable transferee can call on the trustee, having given notice of the assignment, for a legal transfer into his name. The executors or administrators of a person may receive dividends or transfer stock, on leaving at the bank for registration the probate or letters of administration.

A person interested in stock standing in the books of *Distringas*. the Bank of England, or any other public company, may, by filing an affidavit as prescribed by Rs. 21—30, R. S. C., April, 1880, prevent the transfer of the stock for five years without notice to him. This notice can be kept on foot by serving a renewal notice before the end of the time, and so on. If a request is made by the person in whose name the stock stands to transfer it, the company must not withhold the transfer for more than eight days, unless by order of the Court.

Also stock and shares in public funds and companies, ^{Charging order.} and dividends thereon, belonging to the debtor and standing in his own name, or in the name of the Paymaster-General of the Chancery Division, whether in possession or expectancy, whether vested or contingent, may be charged by order of a Divisional Court or Judge, but no proceedings are to be taken to benefit by the charge till six months from the date of the order—the order to be made in the first instance *ex parte*; which, on notice to the bank or company, will prevent a transfer until the order is made absolute or discharged. This is to prevent the judgment debtor from disposing of the stock, &c., authorized to be charged (1 & 2 *Vict. c.* 110, ss. 14 and 15; 3 & 4 *Vict. c.* 82, s. 1; *J. A.* 1875, *O.* 46, *R.* 1).

Unclaimed dividends of stock transferable at the Bank of England are, after ten years, applied for the reduction of the national debt. Power, however, is given to the governor of the bank to transfer it to a person showing a satisfactory title—and further, by petition summarily, an order for payment or transfer can be obtained from the Chancery Division, on certain conditions.

Large investments are now made in British colonial stocks and railways, obligations, foreign stocks, railways, and mines, the dividends on which are often high and the coupons payable to bearer. As payment of the principal

and interest generally depends upon the integrity of the borrowers, the parties not being amenable to the jurisdiction of our Courts, these cannot strictly be considered to be incorporeal personal property. They are mostly assignable by delivery, and resemble in form promissory notes.

Joint stock
companies.

Associations of a number of individuals formed with a view for a common profit, with a common capital, were merely large partnerships, only convertible into an ideal single body by a charter from the Crown or an Act of Parliament. This was disadvantageous, because—

1. Very large partnerships are unwieldy for mercantile purposes, *e.g.*, a new partner cannot be introduced without the consent of all the rest, as each partner is the agent of the others, and an agent cannot delegate his authority when he pleases, the maxim being *delegatus non potest delegari*—therefore, members could not freely transfer their shares.
2. As partners could not sue one another at law there were difficulties in the way of the body obtaining its rights from the shareholders, and *vice versa*.
3. The property of the members was liable *in toto* for the debts of the concern.

Various Acts have been passed to remedy these evils, and to provide for the formation of joint stock companies; that is, “associations of persons possessing and trading with a common capital, contributed by them and divided into shares freely transferable, and of which every member must possess at least one.” These companies are—

1. Incorporated by the Crown by charter, or privileged (without being incorporated) by it by letters patent.
2. Cost-book mining companies, which are partnerships governed by custom.

3. Companies incorporated by Act of Parliament, which may be divided as follows:—

I. Companies formed by special Acts and regulated by those Acts alone; but if formed after the 8th May, 1845, the Companies Clauses Act (8 & 9 *Vict. c. 16*) governs them, except where its provisions are varied by the special incorporating Act.

II. Banking companies formed before 6th May, 1844, which, if not registered under the Companies Act, 1862, are governed by 7 Geo. IV. c. 46. These are partnerships possessing particular privileges.

III. Companies incorporated under the Companies Act of 1862 (25 & 26 *Vict. c. 89*), which Act has been amended by the Acts of 1867 (30 & 31 *Vict. c. 131*), 1877 (40 & 41 *Vict. c. 26*), 1879 (42 & 43 *Vict. c. 76*), 1880 (43 *Vict. c. 19*).

The Companies Act of 1862 is an elaborate statute. It provides that as few as seven persons associated together in any undertaking formed for the purpose of gain *may*, and more than twenty persons so associated, or if for banking purposes, more than ten persons *must*, form themselves into an incorporated company, limited by shares, or limited by guarantee, or unlimited altogether. The memorandum of association—which contains the object of formation, amount of capital, and extent of liability, &c., must be signed by each subscriber before, and attested by, one or more witnesses—bears a deed stamp, and when registered binds each member like a deed. The Act contains provisions for protecting the public from adventurers getting up companies, and for reaching and preventing the flight of delinquent directors.

The Act of 1867 (30 & 31 *Vict. c. 131*) allows companies limited by shares, by special resolution, to reduce their

Co. Act,
1862

Co. Act,
1867.

capital, and the Act of 1877 (40 & 41 *Vict. c. 26*) extends this to cancelling any lost, or paying off any excess capital.

Co. Act,
1879.

The Act of 1879 (42 & 43 *Vict. c. 76*) allows unlimited to register as limited companies without prejudice to liabilities incurred before the change.

Co. Act,
1880.

By the Act of 1880 (43 *Vict. c. 19*), accumulated profits may, by special resolution, be returned to the shareholders in reduction of paid-up capital, the unpaid capital being thereby increased by a similar amount.

The possession of letters of allotment of shares or of scrip certificates of shares in projected railway companies is *prima facie* evidence of ownership and of the power of disposition over them. In the case of registered joint-stock companies, or companies incorporated by Act of Parliament, the title to shares is evidenced by production of a certificate of proprietorship, and by reference to the register of the shareholders of the company.

Every company must keep a list of its members, which is open to inspection. Contracts to take shares are governed by rules similar to those applying to other contracts—the letter of application is the request, and the allotment the promise: this need not be in writing, but must be communicated to the applicant (*Gunn's Case*, 3 *Ch.* 40). The Act of 1862 (s. 22) provides for the transfer of shares in companies under it, and shares in other companies are usually transferred by deed.

Contribu-
tories.

Persons liable to contribute on winding up are (i) present members to the extent of their shares or guarantee respectively in companies limited, and to any amount in those unlimited; (ii) past members, for a year after leaving, for debts contracted while they were members, and provided the present members are unable to satisfy the liabilities. The liability of a person to contribute to the assets of a company creates a specialty debt.

Shares in companies are not goods within the 17th

section of the Statute of Frauds (29 *Car. II. c. 3*), and, therefore, the formalities of that section are not necessary to validate a sale. Shares, however, must not be paid for in money's worth as work unless so agreed, the agreement filed with the registrar (*Act, 1867, s. 25*). In companies limited by shares, share warrants may be issued in respect of fully paid-up shares, and these are negotiable and pass by delivery, being payable to bearer (*Act, 1867, ss. 27, 28*).

A company is **wound up**—

Winding-up.

1. By the **Court**, when :

- i. It has passed a special resolution to that effect.
- ii. It does not commence business in, or suspends it for, a year.
- iii. Its members are reduced below seven.
- iv. It cannot pay its debts.
- v. The Court thinks it desirable.

2. **Voluntary**, when :

- i. The time fixed for its existence is over, or, on any event provided for by the articles of association, a resolution having been passed to that effect.
- ii. A special resolution for winding up has been passed.
- iii. An extraordinary resolution that it cannot continue business, owing to its liabilities, has been passed, or that it is advisable to wind it up.

3. Subject to the **supervision of the Court**, when, during a voluntary winding up, proceedings are taken for its being wound up by the Court. Then the Court may make an order that the voluntary winding up shall continue, but subject to its supervision.

The great distinction between compulsory and voluntary winding up is, that in the first case the liquidators are

appointed by the Court, and thus become trustees only for the creditors ; whereas in the second case they are trustees for the company. In a winding up, subject to the supervision of the Court, they are appointed by the company, but are subject to the control of the Court.

A petition to wind up a company may be presented by—

1. The company ;
 2. One or more creditors ;
 3. One or more contributories ;
- or all or any of these parties (s. 82).

But to prevent a person buying shares solely to present a petition, a person petitioning (except where the members are reduced below seven) must have had shares originally allotted, or the shares must have been held by him or his wife, and registered in his or her name, or that of trustees for her, for six months during the eighteen months previous to the commencement of the winding up, or have devolved upon him through the death of a former holder (*Act, 1867, s. 40*). A contributory who has not paid a call cannot present a petition for winding up (*Re Steam Stoker Co., L. R. 19 Eq. 416*).

CHAPTER III.

QUALIFIED PROPERTY.

Qualified property exists in chattels when—

1. The subject-matter is incapable of absolute ownership, as in those cases mentioned on p. 8. It subsists also in the elements—*e.g.*, light, air, and water—which being of a vague and fugitive nature only belong to a person as long as, and to the extent in that, he uses them.

Qualified property.
1. That incapable of absolute ownership.

2. The right of property is apart from the right of possession, the possessor having a kind of special or qualified property, arising from temporary possession, owing to the peculiar circumstances of the owner. Thus, if A delivers chattels to B, there being a trust for their redelivery on the performance of some condition, the chattels are said to be bailed, A being the bailor and having still the property, and B being the bailee having the possession.

2. Ownership and possession apart.
Bailment.

Bailments are either for the benefit of the (i) bailor, as a deposit; (ii) the bailee, as a loan; (iii) both parties, as when property is entrusted to pawnbrokers, carriers, or innkeepers. Bailees in (i) are liable only for gross negligence, in (ii) must take the greatest, and in (iii) ordinary, care. In (i), however, if a person's situation is such as to imply skill, he is always bound to use that skill. As where A rides B's horse to oblige B, if A is an experienced horseman he must exercise his horsemanship, and an injury to the horse would be imputed as gross

negligence in him under circumstances where it would not be in a person who was unable to ride.

The bailment may be of a kind to give the exclusive right of possession to the bailee—if so, he alone (otherwise either party) may sue a third person for the possession of the subject-matter. Pawning and hiring are instances of this.

If goods are lent for hire, proper care must be taken, and the articles returned when the time expires. The hirer is not liable if they are stolen, owing to no fault of his. If hired for a particular purpose, the letter impliedly warrants their fitness for that purpose. There is no lien upon them for expenses incurred in keeping or preserving them.

Carriers.

Persons who carry goods for a reward are either **special**, or **common carriers**. A special carrier is one who does not undertake to carry for all persons indiscriminately, while a common carrier is one who makes it his public profession, and is bound to undertake the carriage of those goods which he professes to carry, and who is liable for all losses, excepting those arising from the act of God or the Queen's enemies. Thus, he is not excused if they are stolen from him, or taken by an irresistible multitude, there being an implied undertaking on his part to convey them safely. He may, however, make a special contract, and is, to some extent, relieved from liabilities by statute (11 *Geo. IV.* & 1 *Will. IV.* c. 68; 28 & 29 *Vict.* c. 94; see the author's "*Outline of Contract*," c. 3, s. 1).

Carriers of passengers are not common carriers, and are merely bound to take ordinary care. They are not liable for goods at all, unless they profess to be carriers of passengers and goods, in which case they are common carriers *qua* the latter.

Warehousemen, wharfingers, &c., are bound to bestow reasonable care on the goods stored; but neither of them are liable for accidental fire. An innkeeper is liable for

goods lost in the inn, and the presumption of negligence is against him. His liability closely resembles, though it is not so great as, that of a common carrier (*Calve's Case*, 8 Rep. 52, 1st Resol.); it has, however, been materially diminished by 26 & 27 Vict. c. 41.

A pledge is another example of Class 3. It differs from Pledge. a mortgage of personalty in that it passes the immediate possession, the pledgee acquiring a special property in the article with a right of retaining it until the debt is discharged (*Jones v. Smith*, 2 Ves. Jr. 378), while a mortgage is a conditional conveyance of the property itself, the interim possession usually remaining with the mortgagor, the whole title vesting in the mortgagee if the condition is not duly performed. In the first case, the lender having the possession may maintain trover, and in the second he cannot until default in repayment.

In a pledge, if no time for redemption is fixed by the contract, the pledgor has his whole life to redeem, unless he is called upon to redeem by the pledgee, and his personal representatives may redeem, if he dies without doing so (*Vauderze v. Willis*, 3 Bro. C. C. 21). After the time for redemption has passed, on due notice to the pledgor, the pledgee may sell the pledge (*Kemp v. Westbrook*, 1 Ves. 278).

In the absence of contrary agreement, even before condition broken, a pledgee may deliver the pledge to a purchaser, who must give it up to the pledgor on tender of the amount.

The doctrine of tacking is applied to mortgages and pledges of personalty to a greater extent than in realty; the pledge being held against the borrower till all advances are paid, without any proof of a contract for that purpose.

The pledgee must not use the thing if it is of a nature to be the worse by using, otherwise he may do so; but he is liable in the event of loss, whereas had he kept the

article locked up, he would not have been, unless he detained it after the money had been tendered. If its nature is such that he is at a charge to maintain it, *e.g.*, a horse, he may always use it. If he parts with the possession, he loses the benefit of the security, possession being the essence of pledge (*Coggs v. Bernard*, 1 *Sm. L. C.*)

Trover. If A finds a chattel he has a right to retain it against everybody (excepting the true owner) into whose hands it afterwards passes—*e.g.*, against a subsequent finder—and he may bring an action, formerly called *trover*, to recover it, which settles the right to immediate possession, though not necessarily the fact of the right of property.

A defendant cannot set up a *jus tertii* against a person in actual possession—*secus*, where the possession is constructive only, constructive possession depending upon good title (*Leake v. Loveday*, 4 *M. & G.* 972).

Distress. A person having the property in goods may lose possession of them by *process of law*, of which seizure by an execution creditor or distress for rent afford instances. The goods distrained cannot be sold before the end of five days, calculated inclusively of the last and exclusively of the first day of taking them (2 *W. & M. c.* 5), and they should be removed from the tenant's premises on the sixth day, or the landlord will be deemed a trespasser for keeping them there, unless the tenant consent (*Winterbourne v. Morgan*, 11 *East*, 395).

No goods can be taken in execution unless the Queen's taxes are paid and also the landlord for one year's arrears of rent, if due (8 *Anne*, c. 14)—unless, indeed, the premises are let at a weekly rent, four weeks' arrears only having then priority (7 & 8 *Vict. c.* 96, s. 67). The goods must be sold in a reasonable time.

Lien. A lien is the right to detain goods until a debt is paid. It may be—

1. **General**—that is, to secure a general balance; but

this is rare, obtaining only in particular trades or by virtue of local custom. A solicitor has a lien, which is assignable, on his client's papers for his charges (as far as his client's interest in them may extend), and this, by 23 & 24 Vict. c. 127, s. 28, the Court may declare to extend to property in litigation in which he is employed. Wharfingers, factors, bankers, and some others, have a general lien.

2. **Particular**—a right of retention of goods for money owing through labour expended on them, or whenever the bailee is compelled to receive them—as is an inn-keeper—this right is given in return for the obligation. The goods cannot be sold, except where their detention is creative of expense, nor their keep charged for.

The right of lien being allowed for the benefit of trade is restricted to trade operations solely, and, therefore, will not lie for the pasture of cattle or the keep of a dog.

The right of lien is not affected by the debt becoming barred by the Statute of Limitations. It is lost by giving up possession or taking another security.

A lien having been lost by the possession being parted with may be again revived—

1. By the goods again coming into possession *bonâ fide*.
2. By exercising the right of stoppage *in transitu*; that is, the seller may retake them while in passage to the purchaser, in the event of the latter's impending bankruptcy (*Gibson v. Carruthers*, 8 M. & W. 338).

No lien arises—

1. If the possession has been obtained wrongfully.
2. If the goods have been entrusted on the personal credit of the owner of them.
3. If the delivery is by a bankrupt or in contemplation of bankruptcy.

Ownership
indiviso.

3. When there are several owners to the same thing, the absolute ownership of each is subject to the rights of the others, and therefore may be considered in a way qualified.

These collective ownerships are either joint or in common.

Joint
ownership.

As in realty, if persons acquire the same interest in chattels, under the same title and taking at the same time, their possession also being promiscuous, they are said to be **joint owners**; and, further, as in realty, if the instrument of donation is a will, the donees need not take at the same time; thus, some of them may be unborn at the period of the property vesting. The shares of those dying first do not pass to their representatives, the survivor taking the whole.

In some cases a donee, to whom property is given jointly with another, will not take the subject-matter jointly with that other. Thus—

1. If one be a married woman, her husband will be joint owner, and she will be entirely excluded.

2. If the case be one of those in which equity in its dislike to joint tenancies considers its interference justifiable, as where the parties have paid in unequal shares, they will be owners in common.

3. By the law merchant, there is no joint ownership of choses in possession amongst partners as far as the *jus accrescendi* applies, the object of the collective interests amongst partners merely being for purposes of gain, and equity extends a similar doctrine to partnership choses in action.

4. Bonds and covenants are usually made to the parties, their executors, administrators, and assigns, and these are held to be joint or several according to whether each of the parties has a separate interest or not, and not so much according to the words used.

5. The Crown cannot own property jointly with a subject, but will, by prerogative, take the whole.

There can also be ownership in common at law of all sorts of personal property, except choses in action, as money may be owed to two or more separately or jointly, for which they sue separately or jointly respectively; but there is no such meaning as owing to persons in common. In equity, however, there may be separate interests in joint debts, the representatives of any deceased creditor taking his share, and even at law a person owning an undivided share may sue for the infringement of a patent (*Walton v. Lavater*, 8 C. B. N. S. 162). Ownership
in common.

The shares of persons owning in common may be unequal, and their titles may originate from different sources, the only link which connects them being promiscuous possession.

Partnerships are mercantile associations, whereby two or more persons agree to share the profits and losses of an undertaking, though *inter se* one may stipulate to be indemnified against loss, yet he will still be liable to third parties for obligations incurred in the conduct of the business. The liabilities of partners are joint only at law, but joint and several in equity; but the partnership creditors must, however, have resource first to the joint assets before they can touch the private property of a partner, this being reserved for his separate creditors, who, on the other hand, cannot touch his share of the partnership property until the partnership creditors are satisfied. Partnership.

Partnerships are constituted for a fixed period, or at will. In the latter case they are dissoluble at option. A deed, though usual, is not necessary at law, nor even writing, unless the term is to last for more than a year from the making.

Persons are not liable for debts incurred by the firm before they become partners, nor after they leave the firm, provided the proper notices of their retirement are given;

neither are they liable for the acts of the others in matters *dehors* the business, *e.g.*, by submission to arbitration; nor by signing a deed without authority; nor, again (in partnerships other than mercantile, *e.g.*, attorneys), by accepting bills, &c.

They cannot sue one another at law in matters involving the partnership accounts (*Wilson v. Curzon*, 15 *M. & W.* 532)—the remedy lies in equity; but they can in independent matters, or for a share in the produce after a final adjustment and a balance acknowledged to be due (*Henley v. Soper*, 8 *B. & C.* 20).

It is only in general partnerships that the holding a share, however small, subjects the holder to the same liability as that of a person holding a more considerable share, and not where the subject-matter is a ship or some specific object.

Further, the **Partnership Amendment Act** (28 & 29 *Vict. c. 86*) has provided that—

- (i) Loans by a contract in writing to a trader, the lender to receive a rate of interest varying according to the profits or a share of the profits, shall not make the lender responsible as a partner; nor
- (ii) A contract to pay a servant or agent of a trader by a share in the profits; nor
- (iii) A share of the profits given to a widow or child of a deceased partner by way of annuity; nor
- (iv) The receipt of a portion of the profits by way of annuity, or otherwise in consideration of the sale of the goodwill of a business—but the lender and vendor of the goodwill as aforesaid receive nothing till the other creditors are satisfied.

Kinds.

Partners are—

- (i) **Active**—those engaged in the business.
- (ii) **Dormant**—those receiving a share of the profits, though their names do not appear. The liability

of these arises from their being undisclosed principals—for every partner is considered the agent of the rest, and binds the firm as such.

- (iii), **Nominal**—those whose names are used as being partners for the purpose of obtaining credit, &c., and who are liable for that reason, though they do not share in the profits.

CHAPTER IV.

CHOSSES IN ACTION.

Choses in
action. THE way to recover property to which there is an immediate right to possession, or damage for injuries to it, or loss by detention of it, or by breach of contract, is by bringing an action, and such right is termed a **chose in action**. The plaintiff on establishing his claim will obtain judgment, which can be enforced.

(i) If for the recovery of money by writ of—

1. *Fieri facias*—whereby the defendant's goods are seized to pay the sum awarded.¹
2. *Elegit*—whereby his land can also be seized.
3. *Sequestration*—whereby the estate and effects of the defendant are sequestered.
4. *Attachment*—whereby the defendant is imprisoned, which lies only in certain cases under the Debtor's Act, 1869 (32 & 33 Vict. c. 62, s. 4, amended by 41 & 42 Vict. c. 54).

Further (5) debts owing to the defendant by a third person (called a **garnishee**) may be

¹ Originally debts and incorporeal property, being merely rights of action, could not be taken in execution. 1 & 2 Vict. c. 110, s. 12, first allowed bills, notes, cheques, bonds, and other securities to be seized under a *fi. fa.*,

and the sheriff to sue in his own name on them. C. L. P. A. 1854, permitted the attachment of debts, the procedure in which is now regulated by J. A. 1875, O. 45.

attached, and (6) a charging order (for which, see p. 17) may be obtained.

(ii) If for the recovery of property other than money or land by writ of:

1. *Delivery.*
2. *Attachment.*
3. *Sequestration.*

(See *J. A.* 1875, Os. 42—49.)

The assignment of choses in action has always been ^{Assign-}discouraged in law as tending to increase litigation: for ment.
the maxim is *Interest reipublicae ut finis litium sit*. There were, however, a few exceptions (see the author's "*Outline of Contract*," c. 7), and choses in action were freely assignable in equity. *J. A.* 1873, s. 24, sub-s. 6, validates any absolute assignment at law in writing by the grantor (not by way of charge only), express notice in writing being given to the debtor.

A debt could always be assigned by power or letter of attorney—e.g., an authority from a creditor to his assignee to sue the debtor in the creditor's name. It need not be by deed, and may be general or special, and if given for value is irrevocable.

Death determines a power of attorney; though a trustee, executor, or administrator doing an act under such a power, in ignorance of the death of the donor of it, or the avoidance of the power, is not liable. (22 & 23 *Vict. c.* 35, s. 26.)

A right of action arises on breach of contract. A ^{Contracts.}contract may arise by (i) deed, in which case it is called a specialty; (ii) writing or word of mouth, in which case it is called a simple contract (see the author's "*Outline of Contract*," c. 1). Without obtaining a judgment, specialty and simple contract creditors can only obtain payment on the bankruptcy of the debtor, though they may have other holds upon him during his lifetime, such as lien or set-off.

Contract
of record.

The highest class of contract is a contract of record, which results in a debt being due by the evidence of a Court of Record, the most familiar instance of which is a judgment. It may arise without the actual decision of the Court, by an instrument often incautiously given when persons are sharply pressed by creditors; for, when there is no defence to an action, an arrangement is sometimes made between the parties by which the creditor agrees to give the debtor time for payment, and the debtor agrees that if the debt is not then paid, judgment may be signed and execution issued. This arrangement is carried out by a **warrant of attorney**, or *cognovit* or **judge's order**. By the Debtor's Act, 1869 (32 & 33 Vict. c. 62, ss. 24, 25), a warrant of attorney to confess judgment in a personal action or *cognovit actionem* is void, unless a solicitor is present at the instance of the person giving it to explain it and its effect to him, and who must also subscribe as a witness. By s. 26 it must be filed in twenty-one days after execution, or else it is void. Warrants of attorney are not now used, 27 & 28 Vict. c. 112, allowing writs of execution to be registered.

Bond.

A **bond** is a deed whereby a person obliges himself to pay a sum of money, or do some act in a certain time, and there is usually added a condition that on performance the bond shall become void. Formerly, when there was a condition in a bond that the obligor should be bound in a certain penal sum (say £100), in the event of not doing some act, the whole sum was recoverable. But, firstly equity and afterwards law itself (by 4 & 5 Anne, c. 16) prevented his sustaining more than the loss with interest sustained by the breach of condition. Hence, a penalty is now *in terrorem* only, and a statement in the instrument that the sum to be paid is not to be regarded as a penalty but as liquidated damages will not make the slightest difference (*Kemble v. Farren*, 6 Bing. 141).

Joint liability resembles joint ownership, and on the death of one the survivors are solely liable, and this holds indifferently, whether the death took place before or after judgment. Each is liable *in toto*, and all must be joined in suing, and if one is discharged the debt is gone.

Most liabilities are made joint and several. When this is so, a creditor can release one without its affecting his rights against the rest, either by (i) reserving his rights against the others, or (ii) covenanting not to sue the one. For though by releasing one the joint liability is gone, yet this does not affect the several liability. Partnership liabilities are always joint and several.

Joint debtors are in all respects considered as one, except in the following cases :—

1. If one is discharged (i) by the Statute of Limitations, (ii) by bankruptcy, this does not affect the liability of the rest (9 *Geo. IV. c. 14, s. 1*). Therefore an acknowledgment given by one cannot prejudice the others.

2. Judgment recovered against any here is no bar to any beyond seas being sued on their return, and the benefit of the Statute of Limitations against any is not affected (i) by the absence of others beyond seas (19 & 20 *Vict. c. 97, ss. 11, 12*), or (ii) by part payment, &c., by any one of them (*s. 14*). No part of the United Kingdom, Isle of Man, or Channel Islands is considered beyond the seas.

In order to prevent actions being brought many years after the right of action has accrued, the Legislature has fixed periods limiting the time of suing.

By 21 Jac. I. c. 16, all actions for simple contract debts (excluding Crown debts) must be brought in six years after the cause of action has arisen—that is, directly after the plaintiff is entitled to sue. Thus, if A gives B a bill payable six months from date, and dies intestate at the end of two months, and administration is not taken out for a year, the cause of action will not arise for a year.

Again, suppose it had been B who died intestate and administration was not taken out for a year, then similarly the statute would begin to run from the end of the year, there being no one to be sued in the former case and no one to sue in the latter in the interim. Had, however, B left an executor, the statute would begin to run immediately the bill was due, as the executor could have sued even before probate.

A subsequent promise to pay will constitute a new contract and revive the liability, and therefore the statute will begin again to run from the date of such promise; but by Lord Tenterden's Act (9 *Geo. IV. c. 14, s. 1*), writing signed by the party or—by the Mercantile Law Amendment Act (19 & 20 *Vict. c. 97, s. 13*) by his agent—is necessary to produce that effect. Payment of interest or a part of the principal, being intended as a partial discharge, constitutes a promise; so does an acknowledgment, unless coupled with a refusal to pay, and, according to the better opinion, it must be made to the debtor himself (*Moodie v. Bannister*, 4 *Dr. 439*).

3 & 4 *Will. IV. c. 42*, provides that actions of covenant or debt on bonds or specialties shall be commenced in twenty years after the cause of action accrues, or after any written and signed acknowledgment by the party or his agent, or after any part payment or part satisfaction, even though such acknowledgment is made to a third person (*Roddam v. Morley*, 1 *De G. & J. 1*). Such acknowledgment, &c., does not constitute a new cause of action, but merely extends the old one.

If several parties are liable together or successively, an acknowledgment by one will bind the rest in regard to the same property—*e.g.*, an acknowledgment by the tenant for life will bind the remainderman; but not, according to the better opinion, if the estates are distinct; thus, an acknowledgment by one devisee cannot bind the others (*Dickinson v. Teasdale*, 1 *De G. J. & S. 52*).

These Statutes of Limitation do not bar the right but only the remedy; therefore an executor may retain his own debt, may pay a debt though statute barred, or may set off a statute barred debt owing to the testator or intestate, against money due to the debtor by the testator or intestate, none of which things could he do were the right itself lost.

When the statute has once began to run nothing can stay its operation.

A judgment debt altogether ceases to exist after twelve years—by an extension of the statute 3 & 4 Will. IV. c. 27, s. 40 (*Henry v. Smith*, 2 Dr. & War. 391; *Watson v. Birch*, 15 Sim. 523), which barred judgments against land after twenty years, which is now reduced to twelve years by 37 & 38 Vict. c. 57, s. 8—unless there has been some part payment, or interest paid or acknowledgment in writing signed, by the debtor or his agent in the *interim*, for if so it is in twelve years from then.

Instead of bringing an action, conflicting rights may in certain cases be submitted to arbitration. The act of reference is called a **submission**, and the party who decides an arbitrator; if there are two arbitrators who disagree, an umpire settles the matter, the written decision being termed the award. There are three ways in which matters may be decided by arbitration.

1. By agreement of the parties. Strictly, persons cannot by agreement oust the Courts of their jurisdiction to decide matters in dispute; but for the sake of convenience in matters involving account, investigation, and detail, C. L. P. A., 1854, s. 17, provides that any written submission by consent (*secus*, a parol submission, *Ex parte Glaysher*, 34 L. J. Exch. 411) may be made a rule of Court on the application by motion of any party thereto, unless there is anything therein to the contrary.

If, after agreeing in writing to submit existing or future

differences to arbitration, one of the parties brings an action, s. 11 gives the Court power to stay such action on seeing that the matter is a fit one to be decided by arbitration.

By 3 & 4 Will. IV. c. 42, s. 39, the power of an arbitrator appointed in pursuance of a rule of Court or judge's order or submission, containing an agreement that it shall be made a rule of Court, is not revocable by any party without leave of the Court or judge. But the death of either party before the award determines it.

2. An action having been begun, the parties consent to have the matter settled by an arbitrator. A rule of Court is then drawn up submitting the case to an arbitrator.

3. During an action—by C. L. P. A., 1854, s. 3—the judge may order matters of mere account to be decided by an arbitrator.

An award can be set aside if it can be made a rule of Court, not otherwise, by motion

1. When a nullity and not final;
2. If the arbitrator has behaved irregularly; or
3. Exceeded his authority;
4. If a witness has concealed material facts.

It can be enforced—

1. By action on the award, which is the only remedy when it cannot be made a rule of Court.
2. By attachment, if made a rule of Court.

Also in any cause any question can be referred for inquiry to a referee, that he may report it to the Court, and where any prolonged examination of documents is required, or any scientific or local investigation to be made which cannot well take place under the ordinary procedure, the Court may refer any question, or issue of fact or account, to a referee for trial (*J. A.* 1873, ss. 56–57). If the parties consent that any question shall be tried by a referee they may do so. A referee cannot order judgment to be entered. **Referees** are either **official**, that is,

permanent officers of the Court, of whom there are four, or **special**, that is, chosen to decide the particular matter in dispute. A reference differs from an arbitration in that the decision is subject to review by the Court, while an arbitrator's award is final.

Equitable interests in personalty may be classed under **Equitable interests.** choses in action, and the subject-matter of the interest may be either corporeal or incorporeal. For, whenever the right of a person to property can only be enforced by application to the Chancery Division, his interest (being apart from possession) is said to be of an equitable nature, another being owner at law. Thus, where property is given to A on certain trusts, A has the possession, and may at law exercise acts of complete ownership in relation to the subject-matter; but the *cestuis que trustent* are in equity considered the beneficial owners, their interest being of an incorporeal nature. Equitable interests may also exist where no express trust or confidence is reposed on one for the benefit of another, there being cases in which rights or property, from their nature or from attendant circumstances, are only recoverable in equity. The right of a legatee to a pecuniary legacy (for he cannot recover it from the executor at law, *Braithwaite v. Skinner*, 5 *M. & W.* 313)—of a married woman to enforce her equity to a settlement—may be cited as familiar instances. Equitable interests have always been freely assignable.

On transferring them, notice of the fact to the legal holder is necessary to perfect the title of the purchaser, though the want of it does not invalidate the transaction *quoad* the transferor. But as the transferor may again transfer the interest, the only security which the second transferee can obtain against a prior transferee is to inquire of the legal holder whether he has had notice of such a transaction—the first transferee by omitting to give it arms the transferor with the means of again dealing with

the property, and, therefore, he is postponed to the second transferee. Also, inquiry should be made as to prior charges, and if there are two or more legal holders this inquiry should be made of each of them, for if notice has been given to one it is notice to all; and further, the assurance of there being no prior incumbrance should be given in writing, for if false an action for misrepresentation will then lie, under 9 Geo. IV. c. 14, s. 6 (*but see Lyde v. Barnard*, 1 M. & W. 101).

Equity does not altogether follow the law in the time in which actions may be brought to recover equitable interests; for instance, when there is an express (not constructive) trust, time does not run in favour of the trustee, with one exception—viz., that of a trust for the payment of debts out of personalty; for here the creditors have no privilege, personalty being the primary fund for the payment of debts.

Debts payable on contingencies. Insurance. **Insurance** is a contract by which one party, in consideration of a premium, undertakes to indemnify another party against certain perils or risks to which he is exposed; the instrument embodying it is termed the policy, and the sum paid as the price of the risk the premium.

Marine. **Marine Insurance** occurs when a merchant pays a premium to others to insure against certain risks his goods or vessel. Such policy is said to be open when the value of the thing is not included in the policy, but must be proved at the trial; if included, it is called valued, and if fraudulently valued too high not even the real interest is recoverable (*Haigh v. De la Cour*, 3 Camp. 319).

Fire. Property of any sort may be secured against fire for a limited period by payment of a small premium. It is usually renewed every year.

Life. Also, by payment of an annual premium, varying according to age, profession, and state of health, the life of a person may be insured.

The same general principles of law apply to all policies. There are some slight distinctions between the incidents of life, fire, and marine respectively, and also some difference in detail amongst each of these *inter se*, according to the different terms upon which the various companies advertise themselves as willing to insure. Thus, some life insurance companies will not permit the assured to undertake a sea voyage without paying an extra premium, nor engage in naval or military pursuits.

Policies are assignable—and it is not necessary that the assignee should have any interest—but in the case of fire insurance the consent of the insured must be obtained (*Lynch v. Dalzell*, 4 Bro. Parl. Cas. 431), it not being in its nature assignable.

As indemnification is the sole object of insurance, the insured cannot recover beyond the value of his interest, and if satisfied *aliunde* he cannot recover at all, or if he has already done so he must return the amount—an exception occurring in the case of life insurance, inasmuch as (i) a person may insure his own life to any amount, (ii) a creditor having been paid the debt in respect of which he insured the debtor's life can still recover to the value of that interest, life insurance being now reckoned to be more than a mere contract for indemnity (*Dalby v. India and London Assurance Co.*, 15 C. B. 365).

Policies become void—

1. If there is found to be any misrepresentation or concealment of the true facts on the part of the insurer, for from their nature the insured cannot ascertain the facts himself.
2. If the occurrence on which the money is to be recovered occurs through the wilful or negligent act of the insured, *e.g.*, if a man who has insured his life commits suicide (unless while insane, *Horn v. Australian, &c., Asiatic Co.*, 30 L. T. Ch. 511), or is executed, or if, having

insured against fire, he omits having his chimneys swept, &c., or, there being always implied a warranty in a policy of marine insurance not to deviate, a deviation occurs prior to the loss (*Green v. Young*, 2 Raym. 840).

3. When the terms of the insurance are broken so that the risk may be increased; *e.g.*, introducing explosive or inflammable substances, altering a house from two stories to three, avoids a fire insurance (*Sillem v. Thornton*, 3 E. & B. 882); going to reside abroad avoids a life insurance if there is a clause to that effect. Therefore, in the event of any contemplated change altering the risk from the nature of, or subject to any provision in the policy, notice should be given at the office, and a fresh agreement made.

When the policy becomes void, premiums paid are not recoverable.

Some insurance companies by their prospectuses or by the words of their policies declare them to be indisputable; but there is no such thing in law as an indisputable policy, or one which will not be avoided by fraud or by any other way in which a policy may be avoided (see *Wood v. Dwarries*, 11 Ex. 493).

All insurances of a wagering nature are void *ab initio* as being against public policy—the object, as before remarked, being indemnification and security of person or property against risk, and not speculation. Thus, in marine insurance, the words “interest or no interest,” “without benefit of salvage to the insurer,” avoid the policy (19 Geo. II. c. 37, s. 1); so in life insurance, by 14 Geo. III. c. 48, an insurable interest must exist; thus a person may insure his own life; a creditor may insure his debtor's life to the extent of his interest; a wife her husband's life (by 33 & 34 Vict. c. 93, s. 10); a trustee his *cestui que trust's* life.

Policies are not apportionable under the Apportionment Act, 1870 (33 & 34 *Vict.* c. 35).

16 & 17 *Vict.* c. 59, s. 6, 14 *Geo. III.* c. 78, and 30 *Vict.* c. 23, s. 7, require life, fire, and marine insurances to be in writing respectively.

CHAPTER V.

PERSONALTY IN EXPECTANCY.

Things in
expect-
ancy.

THERE are no estates in personalty as in realty. Therefore at law chattels cannot be limited to one for life, remainder over to another, &c., but the first donee takes them entirely. There is one exception. By will chattels real may be limited in this manner (*Hoare v. Parker*, 2 T. R. 376). Thus, a bequest of a term of years to A for life and then to B will give A the term while he lives, and B will have a possibility of enjoying the term after A's decease, provided it has not expired before that time. This possibility, always capable of assignment in equity, may now also be aliened at law by deed, the Real Property Amendment Act (8 & 9 Vict. c. 106, s. 6) making executory and future interests and a possibility, coupled with an interest, assignable.

Equity, however, allows personalty to be given to several in succession (provided the property is not of a consumable or perishable nature, for it would be useless to limit the amount of consumption of the first tenant in articles such as wine, or other things, *quæ ipso usu consumuntur*). The mode, therefore, to be pursued when this is desired is to give the legal estate in the subject-matter to trustees in trust—suppose for A for life remainder to B—A will then get a life-interest in the income produced, and B will get the corpus, and the interests of both are

freely assignable. If the subject-matter given to A for life, then to B, &c., consists of goods, the life tenant must engage to take proper care of them, and make out an inventory.

By the J. A., 1873 (36 & 37 *Vict. c. 66, s. 25, sub-s. 11*), in cases of conflict between law and equity, the rules of the latter prevail.

Although in equity personalty can thus be limited similarly to realty, yet in one or two cases the analogy fails. By no means can personalty be so tied up as to give anything akin to an estate tail. This is peculiar to real property. The person who is designed to take the entail will acquire the absolute interest in the chattels (*Leventhorpe v. Ashby, Tud. Cas. Pry.*).

The executory limitations which we have just mentioned cannot fail by not being ready to vest directly the previous estate determines, for the doctrines as to the failure of contingent remainders do not apply to chattels, there being no seisin in them. Thus, in a bequest to A for life, and after his death to B when he returns to England, B will not lose his interest if he does not happen to be in England when A dies.

Executory interests must be so limited as not to transgress the **Rule against Perpetuity**, which applies indifferently to real and personal estate, and is framed with a view to prevent property from being rendered inalienable for a long period. It prescribes that the property must vest within a life or lives in being, and twenty-one years after, allowing for gestation, or twenty-one years independently of any life—the time dating from the taking effect of the instrument of donation (*Cadell v. Palmer, Tud. Cas. Pry.*).

CHAPTER VI.

TORTS TO PERSONALTY.

Torta. **Injuries to Personality may occur—**

1. By wilfully destroying or otherwise deteriorating in value articles belonging to another.
2. By using them so negligently that they are injured in consequence.
3. By wrongfully detaining them, or converting them to one's own use.

The actions formerly appropriate to meet these were called trespass, case, detinue, and trover respectively, but all difference between forms of actions are now abolished, the names remaining if at all for the purposes of colloquial convenience.

Every direct forcible injury, or act disturbing the possession of goods without the owner's consent, however slight and temporary it may be, is a **trespass**, whether committed by the defendant himself, or by some animal belonging to him, and actionable—*e.g.*, ill-using the plaintiff's dog, making an illegal distress—and the innocence of the trespasser's intentions is no defence.

If the injury is of a permanent nature, a person entitled to the reversion of the goods can sue, but then only (*Tancred v. Allgood*, 28 *L. J. Ex. Ch.* 362), and a joint owner can sue his co-owner for any act inconsistent with the joint ownership (*see Jacobs v. Senard*, *L. R.* 5 *H. L.* 464).

If a person finds a chattel, it is no trespass to keep it against all the world but the true owner; however, if he damages it, and the true owner eventually makes his claim, the subsequent damage renders the original taking unlawful (*Oxley v. Watts*, 1 T. R. 12).

The remedies for trespass are—

1. **Recaption.**—Provided this can be done without violence.
2. **Action.**—The Court being able to order that execution shall issue for the return of the specific chattel, the defendant having no option of paying the price; and if it cannot be found, unless the Court otherwise order, the sheriff shall distrain all his goods till he finds it (*C. L. P. A.* 1854, s. 78).

Formerly actions of this class were divided into trover, trespass, and detinue.

3. **Replevin.**—When goods are distrained, the owner may have them returned on giving such security as the law requires that he will prosecute his suit, without delay, against the distrainer, and return them if ordered.

All persons must use reasonable care in dealing with chattels, otherwise they are answerable in damages for injury done to the person or property of another (*e.g.*, by the careless navigation of vessels, and consequential injury to piers, or the vessels of others), unless, indeed, the injured party has contributed to the happening of the injury, in which case he is not liable, provided (i) the injury is the probable consequence of the negligence; and (ii) the contributory negligence is a distinct act, and not one in the hour of peril resulting from the original negligence (*Bywell Castle*, 4 P. D. 219); and (iii) is of such a nature as to prevent the party originally negligent from avoiding its consequences (*Davies v. Mann*, 10 M. & W. 546).

The liability of shipowners is limited to £15 per ton of the registered tonnage of the ship, where loss of life or personal injury has occurred to any person in their or in another ship without their actual fault or knowledge (25 & 26 Vict. c. 63, s. 54).

The Board of Trade may hold an inquiry into the matter, but the plaintiff is not always bound by its decision. The damages it can award are limited to £30, the sum being paid in priority to other claims (*see* 17 & 18 Vict. c. 104, ss. 507—512).

By the Common Law, injuries to personalty were remediable only during the lives of the parties. This, however, is now remedied by statute 4 Edw. III. c. 7, providing that executors may sue for injuries done to the personalty of the deceased in his lifetime; and also by 3 & 4 William IV. c. 42, s. 2, the personal representatives of the tortfeasor may be sued for injuries committed in six months before his death to the realty or personalty of another, provided the action is brought in six months after the commencement of the administration (previously the injured party could only recover from such representative to the extent to which he had benefited by the injury). The same section of the same Act extends the remedies of 4 Edw. III. c. 7 to injuries to the realty of the deceased committed six months before death, with the proviso that the action must be brought in one year after death, the damages recoverable being personalty. 9 & 10 Vict. c. 93 further allows an action to be brought by the personal representatives of persons killed by such negligence as would have entitled the deceased to sue, if living—in twelve months after the death—and for the benefit of the wife, husband, parent and child of the person killed.

In cases other than the above, the maxim *actio personalis moritur cum persona* still applies.

CHAPTER VII.

CHATELS WHICH DESCEND TO THE HEIR.

THERE is no property in wild animals until they are ^{Animals} caught or tamed, and the right to take them passing with ^{feræ} the land, those caught or tamed alone belong to the ^{nature.} personal representative. If the landlord has not reserved to himself, or given to another or others (in which case they may enter the land for that purpose) the right of taking game, such right will belong to the occupier of the property; but the right to take ground game (hares and rabbits) is, by 43 & 44 Vict. c. 47, rendered an indivestible right of the occupier (a person having a right of common or occupation for grazing for nine months or less is not an occupier) and one other person authorised by him in writing concurrently with the landlord or other person entitled to do so. Game killed by strangers vests in the person having the right of game on the land (1 & 2 Will. IV. c. 32). The law before this Act as to game, and the still existing law as to other wild animals killed by strangers, is that if A starts game on his own land and kills it in B's land, or starts it in B's (not being his chase or free warren) and kills it in C's, the animal is A's, though in the latter case he commits a double trespass. If A starts and kills on B's land, it is B's.

Title deeds being the bone and sinews of the land pass Title with it without express mention. When lands are settled ^{deeds.}

on several persons in succession, the first freeholder is entitled to the custody of the deeds while his interest lasts. A tenant for years is never entitled to them. A tenant in fee simple may sell or destroy them.

Heirlooms. **Heirlooms** are those chattels which, by virtue of some special custom, follow the inheritance: to wit, the Crown jewels, coat-armour, charters, Court rolls, ancient horns, where tenure by cornage exists. They are now rare, and must not be confused with heirlooming chattels—those pictures, plate, and articles which persons frequently endeavour to tie up with the inheritance by means of trustees as far as the rules of law and equity will permit.

Chattels vegetable. These pass with the land on alienation of it, although not mentioned, but become severed from it in the following cases:—

If **emblements**, namely, those things reared by the labour of man, as corn, they belong to the personal representative of a freeholder. As a rule, a person is entitled to reap what he has sown, and therefore on a sudden termination of a tenancy of an uncertain duration, even though it be a tenancy at will, the outgoing tenant is entitled to the crops. An exception occurs, however, if the termination of the interest has been through the fault of the tenant. 14 & 15 Vict. c. 25, s. 1, allows under-tenants at a rack rent holding from a tenant for life, whose tenancies determine through his determination, to continue to hold until the end of the current year of their tenancy. A tenant for a fixed term for years and a tenant at sufferance, are not entitled to emblements.

Timber (oak, ash, and elm, in all places, and also other trees in certain parts), while uncut, is severed from the land when granted away without it, or when reserved in a grant of the land. A tenant for life must not cut the timber unless his estate is given to him without impeachment of waste; if he cuts it or it is blown down, it vests in the first tenant of inheritance. A tenant for life may,

however, take a reasonable amount of wood for repairs, &c., which is called *estovers*.

Fixtures embrace those things which are attached to the soil, not merely resting by their own weight (*Wansborough v. Maton*, 4 A. & E. 884), nor fixed for a temporary purpose, or for the more complete use and enjoyment of them as chattels (*Hellawell v. Eastwood*, 20 L. J. Exch. 154), but so as to become identified with it.

Fixtures.
Elwes v. Maw, 2 Sm. L. C.

In accordance with the maxim *quidquid plantatur solo, solo cedit*, all things fixed to the soil permanently belong to it according to the common law. This, however, had a deterring effect on agricultural improvements and on the planting of machinery, as tenants would not attach fixtures to the soil, knowing they would lose them on leaving. The rigour of the common law is now greatly mitigated. Agricultural fixtures, if put up with the written consent of the landlord, are removable by the tenant on a month's notice, provided the landlord does not elect to purchase them at a valuation, and provided the soil is not injured by such removal (14 & 15 Vict. c. 25, s. 3). Domestic and ornamental (tenant's) fixtures, and those set up for the purposes of trade, are removable by the tenant for years or life during his tenancy, provided such removal will not injure the estate or demolish the fixture. More latitude is given as to trading than to tenants' fixtures. The executor of a tenant in fee has no claim against the real representative for the fixtures which the deceased has set up, for both are volunteers.

The Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92, s. 53), as to tenancies falling within its scope,¹

¹ The Act, unless it is contracted out of by written agreement, applies to all holdings, except those—

1. Less than two acres ;

2. Not wholly agricultural or pastoral ;

3. Not partly agricultural and pastoral as to the rest.

provides that fixtures set up (i) to which the tenant is not under the Act or otherwise entitled to compensation, and (ii) not in pursuance of some obligation, or (iii) instead of some fixture belonging to the landlord, shall be removable—on a month's notice, subject to the landlord's election to purchase—on payment of rent, &c., and without doing or repairing damage done.

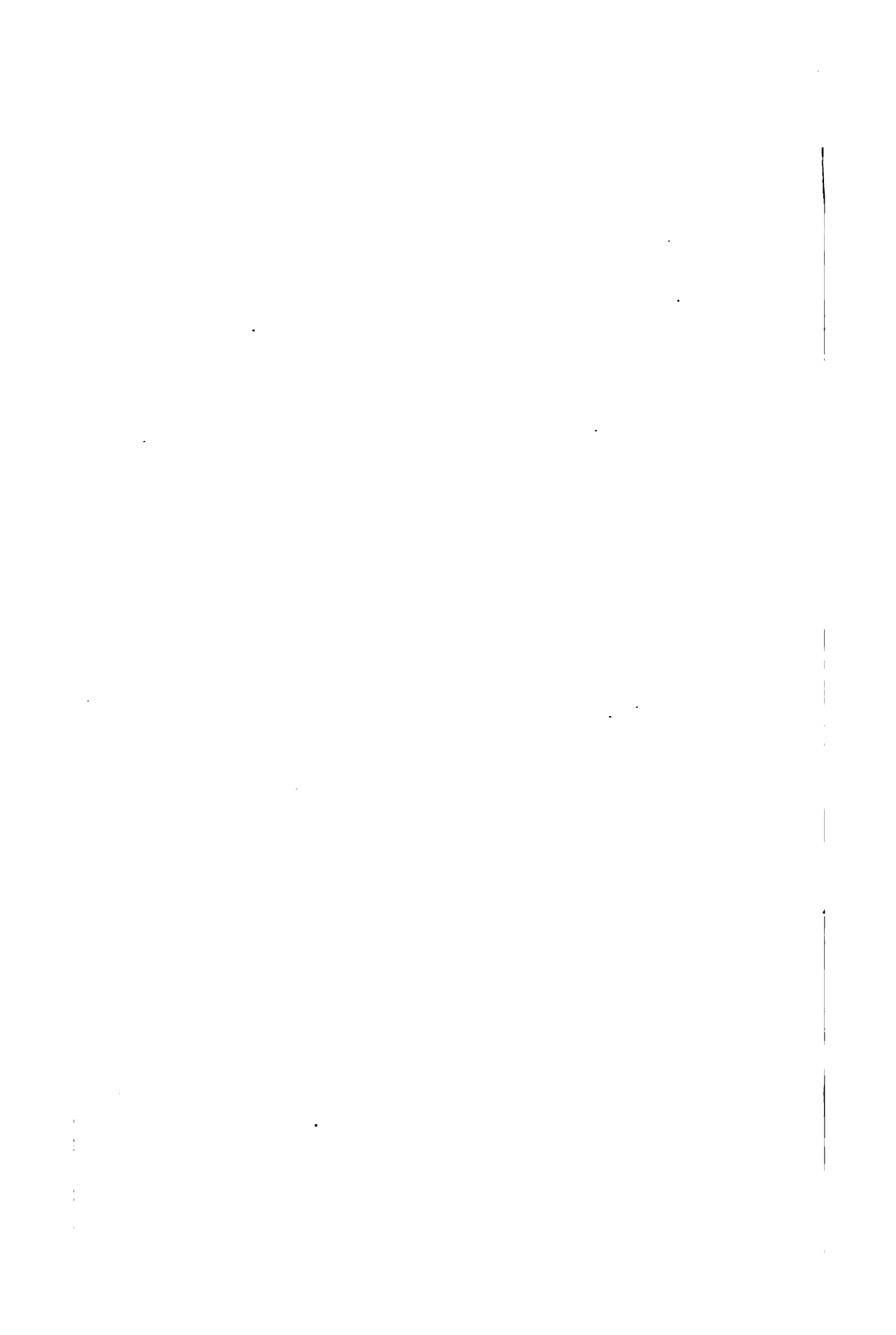
If the tenant erects a steam engine without giving notice to the landlord, or if the landlord objects by written notice, the Act does not apply to such engine.

If freeholds or leaseholds are mortgaged, the fixtures will pass to the mortgagee, even though subsequently set up (*Ex parte Cotton*, 2 *Mont. D. & De Gex*, 725), and no registration is necessary. Under the Bills of Sale Act, 1854, fixtures were included in the definition of personal chattels, but nothing was said as to their being separately assigned, and it was since held (*Ex parte Dalgleish*, *L. R.* 8 *Ch.* 1072) that when in a mortgage power was given to sell the fixtures separately, the latter required registration under the Bills of Sale Act.

The new Act, 1878 (41 & 42 *Vict. c. 31*), has set the subject at rest by providing that an assignment of trade machinery must in every case be registered, and that other fixtures and growing crops (which were not included in the Bills of Sale Act of 1854 at all) must be registered when assigned alone, but not when assigned together with the property to which they are attached, even though assigned by separate words or because power is given to sever them from the land; and this last clause applies to all instruments executed before the Act, being the only instance which has a retrospective effect (s. 7).

PART II.

TITLE TO PERSONALTY.



CHAPTER VIII.

TITLE BY ACT OF LAW.

THE Crown, by virtue of the prerogative, has certain ^{Title by prerogative.} rights to property to the exclusion of the subject, in the following cases:—

1. The Sovereign cannot have a joint property in a chattel with a subject—but the whole will belong to him—his prerogative enveloping the right of the subject altogether. Therefore, suppose A and B have a horse between them, and A assigns his share to the King, the King has the whole, and B has nothing (*Cro. Eliz.* 263). This rule, however, has been relaxed in favour of commercial interests; and, further, on an *extent* against one of several partners, only the share of that partner can be taken (1 *Wright*, 50).

2. Property in wrecks—in goods found flotsam jetsam, or lagan—waifs, estrays, &c. This right is now regulated by 9 & 10 Vict. c. 99.

By the common law, if gold or silver was found in a mine of base metal (according to some), all went to the King. By 1 *W. & M. c.* 30, and 5 *W. & M. c.* 6, the Crown may now have the precious metals contained in the ore, paying the value of the base metal which it is supposed to be.

Waifs are stolen property thrown away by the thief in the fear of apprehension, and seized by somebody for and

given to the Sovereign as a punishment for the owner in not pursuing the thief.

Estrays are animals wandering without an owner. **Royal fish** are the whale and sturgeon. **Jetsam** is that cast into the sea to lighten the ship, which is **flotsam** when swimming and **lagan** when sunk, but attached to a cork, &c., in order to be recognised.

17 & 18 Vict. c. 104, which regulates the subject of wreck, includes flotsam jetsam, &c., and places these matters under the Board of Trade, which nominates receivers of wreck, the proceeds of the sale of which, on non-claim, form part of the consolidated fund.

Bona vacantia are such chattels as go to the Crown owing to their having no owner, as when there is no person entitled to a trust fund.

Treasure trove is money, gold, silver, plate, or bullion found hidden in the earth, or any other private place, the owner being unknown. It belongs to the Crown, and it is a contempt against the prerogative for the finder to conceal it. The owner, on afterwards appearing, can recover it. It is now the practice for the Crown to reward the finder with cash to the value of it. The right does not extend to treasure found on the sea or upon the earth. These belong to the finder.

As head of the Church, the Sovereign has the right of publication of all books of Divine service, and, as executive magistrate, of all Acts of Parliament, proclamations, and orders in council, and by purchase to copies of such works as were compiled at the expense of the Crown.

Title by
custom.

Property vests in persons sometimes by the local usage of some particular place, and sometimes by general usage. Thus—

1. Heirlooms, and things in the nature of heirlooms, go to the heir.
2. The lord of the manor is sometimes entitled to

the best live beast, called a *heriot* (*averium*), which the tenant dies possessed of.

3. **Mortuaries**, or corse-presents, are sometimes due to the minister in certain parishes on the death of the parishioners (*see* 21 *Hen. VIII. c. 6*).

The rule is that the accessory follows the principal. If any corporeal substance receives an accession by natural or artificial means the original owner is entitled to the substance in its state of improvement. So, again, if one takes away and clothes another's wife or son, and afterwards they return home, the garments become annexed to their persons. So, the young of animals belong to their owners, *partus sequitur ventrem*, and the fruit of trees to the owners of the land, &c. But if one person makes an entirely new substance with the property of another, the property will belong to the maker, and not to the former owner, *e.g.*, making grapes out of another's wine.

If the property of two persons becomes intermixed, the portions being indistinguishable—

1. If by consent, the product is common.
2. If negligently or wilfully by one party, the product belongs entirely to the other.

(i.) The husband becomes by law entitled, by the act of marriage, to the following interests in the wife's personality. Her—

1. **Leaseholds** belong to the husband absolutely, provided they are so limited as to be able to fall into possession during the coverture (*Duberley v. Day, Rolls. 16, Jurist. 581*). Thus, if land is given to A for life, remainder to A's wife for twenty years, A cannot deal with the term, as it cannot conceivably come to her while married to him.

2. **Choses in Possession** belong to the husband absolutely, and devolve on his personal representative on his decease.

Title by
accession.

Title by
marriage.
(i.) Husband's
interests in
wife's prop-
erty.

3. **Choses in Action** belong to the husband absolutely, provided he reduces them into possession during the coverture, or as her administrator after her death (but subject to her debts). To recover arrears of rents due on her freeholds before marriage, he need not even take out letters of administration in order to distrain or sue (32 *H. VIII. c. 37, s. 3*). He should sue in the joint names of himself and wife, unless (i) the subject-matter is a negotiable instrument payable to her order, or (ii) a right of action which has accrued to her after marriage, in which cases, if he pleases, he may sue alone, and his indorsement only is required for negotiable instruments (*Mason v. Morgan*, 2 *A. & E.* 30). He may, however, join her if he pleases; by his doing so, if he dies after judgment, but before recovery of the property, the property when recovered will be hers, while if he sues alone, it will be part of his personalty.

4. **Reversionary Interests.**—If they chance to fall into possession during the coverture they will belong to the husband, subject to her right to a settlement if they are of an equitable nature; and if so falling after the wife's death, he can, as her administrator, obtain them. Therefore, if while the interest is still in expectancy he wishes to dispose of it, he can give (with the above qualification) a purchaser a title which will only be defeasible in the event of the coverture determining before his wife's death.

If the instrument giving the wife the reversionary interest is made after 31st December, 1857, **Malins' Act** (20 & 21 *Vict. c. 57*) allows the husband and wife together to give a purchaser an indefeasible title, she being separately examined, and the disposition being acknowledged by her to evidence her free consent—in the same manner as is required by the **Fines and Recoveries Act** (3 & 4 *Will. IV. c. 74*) for her dispositions of realty. But—

- i. If the instrument giving her the property is made before the above date; or

ii. If the donor says that the Act shall not apply; or

iii. If the instrument is her marriage settlement
an indefeasible title cannot be given by any method—
not even if the person enjoying the property before the
expectancy falls in assigns his interest to the wife, so
as to effect a merger of the interests in possession and
reversion (*Whittle v. Henning*, 11 *Beav.* 222).

If a woman while engaged to a man, or during the continuance of that intimate acquaintance which ends in marriage (*Goddard v. Snow*, 1 *Russ.* 485), makes a secret settlement of her property, such settlement will be void, as being presumptively designed as a fraud upon his marital rights; and the fact of his being unaware that she was possessed of property makes no difference. It is only void against the man to whom she was engaged at the time, and therefore, if she breaks off the engagement and marries someone else, it is good against him. If the intended husband has previously seduced the intended wife it is not void at all, as he has in that event put it out of her power to retire from the engagement (*Taylor v. Pugh*, 1 *Hare*, 608).

(ii.) The wife has sometimes a right of enjoyment to and disposition of her own personalty, and it may sometimes be secured for her benefit. Thus as to —

1. **Separate Estate.**—The Court of equity has for long past allowed property of all kinds to be settled on a married woman so that her husband shall have no control over it. It is generally given to trustees to hold for her, but this is not necessary so long as an intention to exclude the marital right is clear. Over this property she has precisely the same power as if she was not married at all; she can dispose of it during her lifetime, or by will, and it is liable for her debts.

As the influence of the husband over the wife is in most cases great, it is further allowed to impose a restriction on her anticipating or dealing with her separate property

Countess of Strathmore v. Bowes,
1 *W. & T.*
Case.

(ii.) Wife's
interests in
her own
property.
Hulme v.
Tennant,
1 *W. & T.*
Case.

—such restriction, it being now decided, remaining during the coverture, disattaching on widowhood, and reviving on a subsequent marriage, unless the widow has entirely altered the nature of the property in the interim.

Tullett v. Armstrong,
1 *Beav.* 1.

Property is separate estate :—

1. When contracted to be so by antenuptial or by special postnuptial agreement.
2. Or given to her with a clause to that effect.
3. Or acquired by her husband's desertion.
4. Or given to her absolutely by her husband.
5. Or by a stranger.
6. By the Married Women's Property Act of 1870 (33 & 34 *Vict.* c. 93), a *feme covert* may sue and be considered as a *feme sole* in regard to (i) her earnings in any separate occupation, (ii) deposits in savings banks, (iii) fully paid-up shares in limited companies, and other institutions without liability which are transferred into her name, (iv) sums of £20 or in the public stocks, also transferred into her name, (v) any policy on her own or her husband's life expressed to be for her separate use—and if married after the Act, (vi) any sum under £200 coming to her by deed or will, (vii) personalty which she acquires as next of kin, (viii) and the rents and profits of realty—there being no contrary provisions in the marriage settlement.

2. Equity to a Settlement.—If the husband in order to reduce a chose in action into possession is obliged to apply to a Court of equity, that Court will only lend its aid upon its own terms, which are, that the husband shall consent to settle so much of the property as the Court shall think fit on the wife, and this settlement shall also survive for the benefit of her children; provided the fund is a corpus. This doctrine has been further extended, and allows the wife to take the initiative and claim this right to

a settlement, and the Court will then prevent the husband from obtaining the property, though the trustees or other persons who hold it are willing to hand it over to him (*Lady Elibank v. Montolieu*, 1 *W. & T. Cas.*). By Malins' Act she may waive her right for herself and children in the manner therein pointed out. There is no equity to a settlement to personalty as long as it is in expectancy.

3. **Will.**—She can dispose of property by will in the cases mentioned (*post*, p. 64).

By Malins' Act she can also release any powers over personalty.

4. **Paraphernalia.**—This consists of ornaments suitable to her rank in life; her husband can sell it in his lifetime, but he cannot leave it by will. It is subject to be taken for his debts.

(iii.) Interests of the wife in the husband's property. (iii.) Wife's interests in the husband's property.

1. He is bound to support and provide for her and prevent her becoming chargeable to the parish.
2. On his death intestate she has one-third of his personal property if there are children, and half if there are none (22 & 23 *C. II. c. 10*, and 1 *Jac. II. c. 17*).
3. If he allows her pin-money, that is, a sum settled before marriage to meet personal expenses, she can claim one year's arrears on his death, and all arrears if she has complained of its being in arrear.

Liability of the husband to the wife's debts.

1. By the Married Women's Property Acts, 1870 and 1874, the husband is liable to the wife's antenuptial debts to the same extent as he has acquired property by her. Before this Act his liability was unlimited.
2. He is liable (i) for her debts contracted during marriage, provided she has contracted them as his agent, and such agency may be implied from

the fact of cohabitation, unless he has directed her not to pledge his credit (*Debenham v. Mellon*, 29 *W. R.* 141), and (ii) for debts contracted for necessaries, if he does not supply her with the necessaries himself, she having no separate property.

CHAPTER IX.

TITLE BY ACT OF PARTY.

THE power of bequeathing personalty dates from the earliest times, though the privilege does not appear to have extended over all a person's property. According to Glanville¹ it embraced a third, a third going to the wife, and a third to the issue; a half was devisable if the testator had a wife only, or children only, the other half going to them, their share being called *pars rationabilis*. Imperceptibly, however, testamentary power covered all the chattels, excepting in a few places where there was a contrary custom, *e.g.*, Wales, York, and the city of London, and this is now abolished by statute.

If a person made no will, the King seized his goods as general trustee of the Kingdom (*parens patriae*); this prerogative soon fell into the hands of the Church, spiritual men being held to be of better conscience than laymen, and hence more likely to deal with the goods in a manner conducive to the welfare of the soul of the deceased, *e.g.*, "To distribute them in charity amongst the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious" (1 *Plowd.* 277). The clergy, being

¹ Succession by testament and on intestacy are considered together here for the sake of convenience; the student must, however, remember that the latter should strictly have been considered in the preceding chapter, being under "Title by Act of Law."

accountable to none but God, flagrantly abused this power reposed in them, even declining to pay debts, and thus they rendered legislative interposition necessary—31 *Edward III. c. 11* compelling the ordinary to depute the administration of the goods of the deceased to his nearest kindred.

The Probate Act, 1857 (20 & 21 *Vict. c. 77*), has abolished the jurisdiction of the Ecclesiastical Courts over the granting of probate and letters of administration, and established the Court of Probate, which Court is now merged into the High Court of Justice, its functions being deputed to the Probate, Divorce, and Admiralty Division of that Court (36 & 37 *Vict. c. 66, ss. 16, 22, 34*).

County Courts have probate jurisdiction where the personalty is not over £200 and the realty under £300.

Who can
make a
will.

All persons can make a will provided they do so voluntarily, and not under undue influence, excepting—

1. **Those of Unsound Mind.** But delusions on one particular subject do not affect the capacity (*Smee v. Smee & Corp. of Brighton*, 49 *L. J. P. D. & A.* 8). Intoxication is temporary insanity (*Wheeler v. Anderson*, 3 *Hog. Ecc. R.* 602).
2. **Infants.** But if soldiers and sailors on active service they may make a nuncupative will.
3. **Married Women.**¹ A married woman may, however, make a will—
 1. Where her husband is legally (not heard of for seven years) or civilly dead.
 2. Where the property is equitable or statutory separate property, or is vested in her *en autre droit* as executrix, or the will is in pursuance of an antenuptial agreement, or

¹ The will of a married woman speaks from the date, and not from the death, and therefore must be republished on her becoming a widow to entitle her to general probate.

by virtue of a power, or acquired after she has obtained a protection order or a judicial separation.

3. With her husband's consent, which he has not revoked before probate. This assent, being nothing more than a waiver of his rights as her administrator, only holds if he survives, and is not binding on her next of kin if he predeceases her. His general assent is not sufficient—it must be an assent to the particular will.
4. If she is the Queen Consort.

The **solemnities** for the execution of a will of personalty **Solemnities.**
made by a person—

- (i) Residing in the jurisdiction of the High Court since the Wills Act, 1837, are the same as those required for wills of realty—that is, they must be in writing, and signed at the foot by the testator, or by some other person in his presence and by his direction, and such signature must be made or acknowledged by the testator in the presence of two or more credible witnesses present at the same time, who must attest in the presence of the testator (*7 Will. IV. & 1 Vict. c. 26, s. 9*). Before this Act, nuncupative wills were allowed, but owing to the many restrictions with which the Statute of Frauds surrounded them they were rare. Signature and attestation were never essential. Soldiers on an expedition (*White v. Ripton*, 3 *Curt.* 815), and sailors, including officers (*In goods of Saunders*, 11 *Jur. N. S.* 1027), on active service, may still make a nuncupative will (s. 11); but the Board of Trade may refuse to pay wages or deliver their effects to the persons claiming under such a will, unless

it is acknowledged and attested as prescribed by section 200 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104).

(ii) Not residing in the jurisdiction—being a British subject, by 24 & 25 Vict. cc. 114 and 121, the will is good: if made agreeably to the law—

1. Of the place where made, or
2. Where the testator was domiciled when made, or
3. Of his domicile of origin;

and if made within the kingdom, it need only be made according to the forms required by the law where made.

Before this Act a will had in every case to be made according to the law of the domicile¹ of the testator at his death.

Alterations, interlineations, &c., must be signed or initialled (*In goods of Blewitt*, L. R. 5 P. D. 116) by the testator and witnesses opposite.

Executor.
Who?

An executor is the person appointed by the will to represent the testator *qua* his personal property, to pay his debts, and distribute the residue according to the directions of the will; and no legacy will belong to a legatee until the executor has assented to his having it.

Many persons can be executors who cannot make wills, such as infants and married women. But it is not advisable to appoint such persons, for the latter cannot act without her husband's consent, while he can deal with the property without her consent—and the former has not the discretion to act during minority.

Executors are appointed *directly*, or *according to the tenor*, *i.e.*, impliedly, as where A is made executor if B will not act.

An executor *de son tort* is a person who wrongfully intermeddles with the goods of deceased—as would be

¹ *E.g.*, that place which a man home. A question of fact, and one intends to make his permanent frequently difficult to determine.

one who acts as executor on the death but fails to obtain probate. Such a person has all the disadvantages, but none of the advantages, of an executor. Merely doing acts of humanity, such as burying the corpse, is not wrongful intermeddling.

If no executor is appointed, or the executor is dead or will not act, or cannot be found, the Court desirous of carrying out the intention of the testator as far as possible will appoint the person having the greatest interest, usually the residuary legatee, to administer the property according to the terms of the will; if the will does not show who is the largest claimant, the Statute of Distributions points out the parties.

Any undisposed of residue goes to the next of kin (1 *Will. IV. c. 40*). Formerly the executor was presumptively entitled to it, unless he had a legacy given him for his trouble, or there was something to show the contrary.

The duties of executors may be roughly said to be— Duties of executors.

To bury the deceased in a manner suitable to the estate he leaves behind him.

To make an estimate of the personalty, without reckoning the debts, prove the will, and pay the duty thereon.

To make a correct inventory of the goods.

To get in the assets and bring actions for that purpose, leaving nothing outstanding on personal security, however good; converting wasting and perishable property, and investing in those securities which trustees, executors, &c., are authorised to invest in. *See p. 103.*

To pay the debts from the assets.

To pay the legacies, deducting duty, handing over the residue to the residuary legatee, or next of kin, if there is none.

Before payment of legacies an executor should consider several things—*e.g.*, whether the case is one of those in

which a legatee is put to his election ; whether the legacy is satisfied (*see p. 74*) ; and, if the legatee is a married woman, whether the legacy is separate estate—if not, whether she desires an equity to a settlement (*see p. 60*) ; whether, if there have been settlements, they touch after-acquired property (*see p. 97*).

An executor may do any acts incident to his office from the death (*e.g.*, bury the deceased, make an inventory of the goods, &c.) ; an administrator may not do anything until he has obtained **letters of administration**, and the property till then vests in the Judge of the Probate Division. But after letters of administration are granted their powers of duties are similar, except in one or two minor points. An administrator (unless he is administrator *cum testamento annexo*) is not bound to perform a will. Thus, he need not carry on the testator's business on the executor's refusing to act. Again, executors have a joint and several power to act, whereas administrators only have a joint one.

Privileges
of execu-
tors, &c.

A year is allowed to get in the property, pay debts and legacies. Executors may retain debts due to themselves in preference to those of others, and also prefer one creditor to another, provided the debts are of equal degree ; they may pay statute-barred debts, but it is at their own risk to do so after decree. They may stipulate for compensation on acceptance. If an executor dies before he has acted, slight proofs are sufficient to indicate an acceptance, so as to allow him to take a legacy to executors. They may protect themselves from subsequent claims by giving the same notices as are given in an administration suit (22 & 23 *Vict. c. 35*, s. 29), and assign leases, convey property subject to rent-charges, freeing the estate from further liability as to their performance (ss. 27, 28). They have full power to sell, mortgage, or deal with the property, and one may do this even without the consent of the rest (*Russell v.*

Plaice, 18 *Beav.* 21), and in certain cases they may sell the land (*see the author's "Real Property," p. 136*). They may pay claims on such evidence as they think fit, accept composition for debts, allow time for their payment, compromise, compound, submit claims to arbitration, &c. (23 & 24 *Vict. c. 145, s. 30*).

Executors labour under the same disadvantages as trustees. Thus, they may make no profit if debtors to the deceased on taking out probate; they are held to have the amount as assets in their hands, and the Statute of Limitations does not run in their favour, so that they cannot by delay in proving escape payment of debts owing.

Disadvantages of executors

Again, they cannot sue *in forma pauperis*, the privilege being personal.

They are also in certain cases liable for one another; as where one knowingly allows another to commit a breach of trust, as to leave debts outstanding.

They are liable for negligence or *devastavit*s, as paying invalid claims, or lower debts before higher ones, and for property which they might have obtained had they used due diligence in suing for it.

They are personally liable if carrying on the testator's trade, although by his direction, although only so much of his assets are liable as were left in the business; and this is owing to the difficulty of recovering more from the legatees.

If an executor renounces, he cannot afterwards accept, on changing his mind (20 & 21 *Vict. c. 77, s. 79*). Formerly, if a co-executor, he could subsequently have accepted provided he had renounced while the others lived, but not after they were dead.

A will of personalty must be proved, but not a will of Probate realty only, unless executors are appointed; and not even then if it is made under a power, as their authority is limited to the property passing under it, and they take nothing *jure representationis* (*In goods of O'Dwyer*, 5 *Jur. N. S.* 1366).

Exceptions
to probate.

There are a few statutory exceptions to the rule that probate or administration must be taken out before the personalty of the deceased can be dealt with—*e.g.*, the effects of merchant seamen under £50 (17 & 18 *Vict. c.* 104, *s.* 199); deposits (i) in savings banks (26 & 27 *Vict. c.* 87, *s.* 43), (ii) building societies (37 & 38 *Vict. c.* 42, *s.* 29), officers' and soldiers' pay under £50 (1 *Will. IV. c.* 41, *s.* 5)—can be obtained by their relatives, by observing the formalities of the Acts, and on proving the relationship. There are a few more similar cases.

The Court cannot grant probate or administration of the goods of a person who left no property in England, and was not domiciled here (*In goods of Winter*, 30 *L. J. P. & M.* 56).

Caveat.

When a person desires to oppose the issuing of probate or administration he enters a **caveat** in the Registry, which prevents such an issue (for six months), without notice to him warning him to enter an appearance in six days and contest the grant.

Probate will not be granted till after seven, nor letters of administration issue till 'after fourteen days from the death, unless by order of the Judge or two Registrars; and to obtain grants after three years from the decease the reason for the delay must be certified to the Registrars.

Probate,
how
obtained.

A will is proved by being deposited in the Probate Division, and the executor then swears that it is the last will of the deceased, and that he is the true executor. But if there is no proper attestation clause¹ one of the witnesses must also swear. This is probate in **common form**. If the will is disputed the probate is in **solemn form**, *i.e.*, obtained by decree of the Court, both the witnesses being sworn and examined before all the persons interested, who

¹ The attestation clause is as follows:—Signed by the said (testator) in our presence, who in his

presence and in the presence of each other at the same time subscribe our names as witnesses.

are cited for that purpose.¹ If both witnesses are dead or unproducible, evidence on affidavit must be given of that fact, and of the writing of the deceased and witnesses (*In goods of Latham*, 10 *Jur. N. S.* 620).

A copy of the will, called the **Probate copy** (the original remaining in the custody of the Registry), is given to the executor on proof of it, this copy being the evidence of his executorship.

Executors need not prove at the same time. When one proves subsequently the grant made is said to be a **double probate**.

When a will is lost probate may be granted of the whole or such portions as can be proved, secondary evidence being admissible (*Sugden v. Lord St. Leonards*, *L. R.* 1 *P. D.* 154).

The Customs and Inland Revenue Act, 1880 (43 *Vict. c.* 14), regulates the *ad valorem* duty with which probates and letters of administration must be stamped. Personalty of £100 or under has long been exempted from any duty, and there are exemptions under special Acts of Parliament in favour of some of the services. Duty is paid on appointed property whether the appointor had any interest or not in it (23 *Vict. c.* 15, s. 4).

The receipt which a legatee gives is chargeable with duty, called **legacy duty**. It varies in amount according to the relationship.

Lineal descendants and ascendants	pay 1 p. c.
Brothers, sisters, or their issue	.
(i) of the deceased	„ 3 p. c.
(ii) of his father or mother	„ 5 p. c.
(iii) of his grandfather or	.
grandmother	„ 6 p. c.
Other persons	„ 10 p. c.

¹ A will may be required to be proved in solemn form in thirty years after being proved in common form. Solemn form of course establishes it for ever, unless a subsequent will is discovered, or there has been some fraud, &c.

No legacy duty is payable—

- (i) where the deceased dying after 24th March, 1880, leaves less than £100 personalty (43 *Vict. c. 14*, s. 13);
- (ii) on legacies of £20 or less (8 & 9 *Vict. c. 76*, s. 4);
- (iii) by husbands or wives;
- (iv) by the Royal Family.

Duty on life annuities is made by four yearly payments, as fixed by the tables of the Succession Duty Act (16 & 17 *Vict. c. 51*, s. 31).

Legacies.
Kinds.

Legacies are—

- (i) *vested*—that is, when there is no condition precedent which may defeat them;
- (ii) *contingent*—when the happening of an event determines whether the legatee will take or not. The Court always reads a legacy as vested if it can—*e.g.*, legacies for “all A’s children equally on his death” will make all entitled, even though dying during minority and before the parent.

Legacies are said to be—

- (i) *General*, when payable out of the general assets of the testator—*e.g.*, a bequest of £50 to A;
- (ii) *Specific*, when a particular thing, as a diamond ring, is given;
- (iii) *Demonstrative*, when the source from which a general legacy is to be taken is specified—*e.g.*, £50 to A payable out of my property invested in consols.

As may be seen (p. 83), a general legacy abates on deficiency of assets before a specific legacy. A demonstrative legacy has the advantage of a specific one in this particular, as it ranks with it. It also has the advantage of a general legacy over a specific one, in that it is not adeemed by the particular object being disposed of or destroyed in the testator’s lifetime; for if, in the above instance, the testator had no consols at his death, the legacy

would be paid out of some other property of which he died possessed.

Interest is due on legacies from death (i) when they are given to the children of the testator or to infants, there being a direction for maintenance—(ii) when charged on land—or (iii) when demonstrative, the proper fund remaining.

It is due from a year after death when a legacy is general or demonstrative, the proper fund failing.

If a legatee dies before the testator, his share will lapse to the residuary legatee, or, if none, to the next of kin (and the fact that it is given to him, his executors, administrators, and assigns, makes no difference), unless—

1. The legatee is a child or other issue of the testator and dies leaving issue, in which case it will pass under the will of the deceased, or go to his personal representative if he died intestate (1 *Vict. c. 26, s. 33*).
2. The legatee is joint tenant, for then the survivor will take.
3. The bequest is to a class, as the children of X, for those representing that class at the period of distribution will take the whole, as where A gave property to his wife for life, with a direction to pay his debts, and to make such distribution amongst his children as might be fair; those children living at the time of the wife's death alone are entitled (*Freeland v. Pearson, L. R. 3 Eq. 658*).

A legatee is entitled to a legacy from the death of the testator. The circumstances which may prevent his taking are—

1. Lapse of time. If it is not claimed in twelve years¹ after the right to recover it has accrued

¹ Formerly it was twenty years (3 & 4 *Will. IV. c. 27, s. 40*). The right of the next of kin to recover in the case of intestacy is still twenty years (23 & 24 *Vict. c. 38, s. 13*), the above Act only applying to legacies.

it becomes statute barred (37 & 38 *Vict. c. 57*); or if any principal or interest has been paid, or acknowledgment given, it is barred in twelve years from the time of such payment or acknowledgment.

2. His own death before payment, there being then a lapse, provided—
 1. The legacy is contingent; or
 2. It is charged on land, the period of payment being postponed otherwise than for the benefit of the estate.
3. Its being satisfied. If two equal legacies are given by the same instrument, the one is deemed to be a satisfaction for the other, in the absence of internal evidence to the contrary; and the rule is the same if they are given by different instruments, provided the same motive for the gift is expressed. Also, where a parent gives a legacy to a child, not stating the purpose for which he gives it, the Court understands him as giving a portion; and by a sort of artificial rule, if a father advances a portion on the marriage of that child, the portion is presumed to be an ademption of the legacy *pro tanto* or *in toto*, as the money advanced is less, equal to, or greater than the sum expressed to be given as a legacy (*Pym v. Lockyer*, 5 *M. & C.* 29).
4. Its abatement for debt; for if there is not sufficient to pay creditors, the different kinds of legatees must lose their legacies in the order subsequently mentioned (p. 83).
5. If he is an illegitimate child—
 - (i) He cannot take under a gift to children, unless legitimate children never could have taken; supposing they could have taken,

extrinsic evidence is not admitted to show that he was intended to take (*Ellis v. Houstoun*, *L. R.* 10 *Ch. D.* 236), and unless (owing to their reputation as children) it is clear they were designed to take (*Lepine v. Bean*, *L. R.* 10 *Eq.* 160).

- (ii) If unbegotten at the date of the death he can never take—though he may if the mother was *enceinte* at the date of the will and the child is born at the death—in consequence of having acquired the reputation of being a child (*Occleston v. Fullalove*, *L. R.* 9 *Ch.* 147).

- 6. If the object of the legacy is an eleemosynary body, it cannot take personalty savouring of land (9 *Geo. II. c.* 36, *s.* 1).

Thus it cannot take—

1. Money to be laid out in lands (*Smith v. Oliver*, 11 *Beav.* 481).
2. Leaseholds (*Att.-Gen. v. Graves*, *Amb.* 135).
3. Realty, though part of partnership assets (*Ashworth v. Mann*, *L. R.* 15 *Ch. D.* 303).
4. Nor any shares or debentures in such companies which give the holder a right against land which the company holds (*Ashton v. Lord Langdale*, *S. C.* 15 *Jur.* 868), though the fact that the holding of land is incident to the business of the company does not apparently prevent its shares being left to a charity. Thus it was decided in *Attree v. Howe*, *L. R.* 9 *Ch. D.* 337, that debenture stock created by the Company's Clauses Act, 1863, was not an interest in land under 9 *Geo. II. c.* 36; and there have been similar decisions as to railway scrip, dock, canal shares, &c.

Legacies given to persons who cannot take at once, as infants and those abroad, should be paid by the executor into the Bank of England with the privity of the Paymaster-General, legacy duty being deducted; and the person entitled to obtain the money and interest must apply to the Chancery Division summarily by petition or motion (36 *Geo. III. c. 52, s. 32*).

Adminis-
tration.
Order.

The order in which persons may claim **administration** is as follows—

1. Husband or wife.
2. Children.
Grandchildren.
Other descendants.
3. Father.
4. Mother.
5. Brothers and sisters.
6. Grandparents.
7. Nephews and nieces, uncles and aunts, great grandparents.
8. Great nephews, &c., uncles, &c., persons in the same degree being entitled equally.

If none of the next of kin will claim administration, a creditor may do so, although his debt is statute barred.

When there are several parties in equal degree the Court prefers males to females, whole blood to half blood, and usually makes the grant to those first applying to the exclusion of the rest, a sole administration being preferred to a joint one (*E. Warwick v. Greville*, 1 *Phil.* 126).

Lunatics, minors, &c., cannot administer. Married women may do so, the husbands consenting and signing the administration bond. A husband may take out administration in right of a wife—a right of which she cannot deprive him (*Haynes v. Matthews*, 1 *S. & T.* 460); but in other cases the Court has discretion to whom it will give the grant.

Administrators execute a bond, with one surety or

more, conditioned for administering the personalty, the amount being double the property.

Grants of administration are—

I. General.

II. Limited.

I. In duration.

- (a) *Durante absentia*—e.g., during the executor's absence.
- (β) *Durante minore ætate, durante dementia*—when the sole executor is an infant, or insane.
- (γ) *Pendente lite*—pending a suit touching the validity of the will ;
- (δ) Until a will lost temporarily is found.

II. For a special purpose.

- (a) *Cæterorum*—to administer a residue.
- (β) *Cessate*—a supplementary grant given on the determination of a limited administration.
- (γ) *Ad colligenda bona*—for immediately collecting the effects when of a perishable nature.
- (δ) *Save and except*—where some portion of the property is excluded.

III. To some special property.

De bonis non administratis.—When an executor dies before he has fully administered the estate, without appointing an executor, a limited grant must be taken out to complete the administration. This is not necessary where the executor dies leaving an executor, because an executor of an executor is executor to the testator. But an executor or administrator of an administrator, or an administrator of an executor, does

not represent the testator or intestate, for administration once having to be taken out breaks the claim of representation; for it is clear that a different person would be entitled to administer the property to the testator or intestate to the person entitled to represent his deceased representative.

The order in which the next of kin succeed, after payment of debts, &c., in cases of intestacy, or in cases of testacy after the legacies are also paid, is regulated by the **Sta. Distribution** (22 & 23 Car. II. c. 10, and 1 Jac. c. 17)—

As follows:—

The husband takes all the wife's personalty.

The wife takes half the husband's if there are no children; otherwise she takes one-third;

Subject to this:—

The children, male and female, are entitled *per capita*,¹ the descendants of any dead claiming *per stirpes*¹ through them.

If all the children are dead, their descendants take *per stirpes* (*Ross's Trusts*, 20 W. R. 231).

If there are no descendants, the father of the deceased takes all.

The mother, brothers and sisters are next entitled equally, the children of any deceased brothers or sisters standing in their places (*per stirpes*).

But if the mother, brothers and sisters are all dead, brothers and sisters' children succeed *per capita*, and not *stirpes*.

There is no further right of representation beyond

¹ *Per capita, per stirpes*.—Illustrations.—B, C, D (children of X, deceased), E, F (children of Y, deceased), G (child of Z, deceased), are grandchildren of the only descendants of A, who has died intestate. B, C, D take one-third, E, F take one-third, G takes one-third, each claiming what their respective parents would have had, had

they lived. This is succession *per stirpes*. Again, B, C, D (children of X, deceased), E, F (children of Y, deceased), G (child of Z, deceased), are nephews and nieces of A (X, Y, Z having been brothers and sisters). They take one-sixth a piece (no mother or other brother or sister of A being living). This is succession *per capita*.

brothers' and sisters' children, but the nearest in degree to the deceased takes; if there are several equally near, they share *per capita*, no distinction being made between half and whole blood. If there are no next of kin, the property vests in the Crown.

If persons in immediate succession perish by the same calamity, the presumption is they died together; but evidence is allowed to show the probability is different. Comemo-
rientes.

As executors and administrators are considered trustees in equity, and liable to all equitable demands, Courts of equity have for long entertained suits for the payment of debts, legacies, and the distribution of the property of intestates. Adminis-
tration
suits.

By 15 & 16 *Vict. c. 86, s. 42*, creditors (even though claiming under a voluntary bond,¹ Rules 1—9), legatees, next of kin, executors—in fact, any persons interested—may proceed by summons at Chambers, and obtain a decree for administration of the personalty.

All Courts but those of equity have lacked the efficient system of examination of accounts, of discovery, and of enforcing decrees requisite for administration. Hence equity has always exercised a jurisdiction auxiliary to other Courts in this respect, only meddling with their rules when owing to some cause she could claim to do so.

The priorities of creditors at law are as follows, in regard to the payment of their claims :— Order of
payment
of debts.

1. Testamentary and funeral expenses.
2. Crown debts by specialty and record.
3. Debts to which particular statutes give priority.
4. Judgments, &c.
5. Recognizances and other records.
6. Specialty and simple contract debts, *pari passu*, provided the death occurred after the passing of 32 & 33 *Vict. c. 46*.
7. Voluntary bond debts. But the assignee for value

¹ Before *J. A. 1873, s. 25*, a voluntary assignee could not obtain administration, as a chose in action was not assignable at law, and equity would not assist a volunteer.

of the equitable interest in a voluntary bond stands on the footing of a specialty creditor (*Payne v. Mortimer*, 4 *De G. & J.* 447). It is questionable whether voluntary bills and notes stand on the same footing as voluntary bonds. At common law a voluntary negotiable instrument is a *nudum pactum*, and equity never aids a volunteer.

8. Interest on debts not by law carrying interest.

But if a person devises his land on trust to pay, or charges it with his debts, he imposes a trust upon the devisee which equity will see is carried out; and as the creditors had formerly to thank equity for getting paid at all, she claimed to regulate the distribution of the assets according to her own peculiar principles, which were based on the maxim that equality is equity, and creditors were paid equally; debts of a voluntary nature being altogether ignored. The property is termed equitable assets, and has always been distributed *pari passu* as regards specialty and simple contract creditors.

Insolvent
estates.

In the administration by the Court of the estates of persons who have died insolvent since 1 Nov., 1875, and in the winding up of insolvent companies after that date—by J. A. 1875, s. 10—the bankruptcy rules prevail in three particulars:—

1. **As to the rights of secured and unsecured creditors.**—A secured creditor is one who has a mortgage, lien, or charge upon some property of the debtor, such charge, &c., not being of an inchoate nature: as a judgment creditor who has delivered land into execution under 27 & 28 Vict. c. 112, by virtue of a writ of *elegit*; a person who has served an order on a garnishee under J. A. 1875, O. 45, or has obtained a charging order on stocks or shares in the funds or public companies under 1 & 2 Vict. c. 110, ss. 14, 15, and 3 & 4 Vict. c. 82; or a mortgagee, &c.

By s. 40 of the Bankruptcy Act of 1869 (32 & 33 Vict. c. 71) such a creditor may either realise on his whole debt and prove for the balance, or should he prefer he may throw up his security and prove for the whole debt; the former rule in equity was that he might prove for his whole debt, and still retain to secure for any balance. It is clear this rule has been introduced to favour the general body of creditors.

2. **As to the debts and liabilities proveable.**—By 32 & 33 Vict. c. 71, s. 31, this includes all debts and liabilities future or contingent, excluding alone damages recoverable by actions of tort, judgment in which has not been signed before the adjudication, and liabilities which cannot be estimated. Also in bankruptcy, debts which are statute barred cannot be proved.

3. **As to the valuation of annuities and future and contingent liabilities respectively.**—The Court ascertains the value of an annuity considering the original price, and deducting any diminution in value owing to lapse of time. The value of contingent debts, &c., is found by the Court or a jury with the assistance of actuaries.

The executor's right of retainer (*p.* 68) is not affected by J. A., 1875, s. 10, although the money is paid into Court (*Richmond v. White*, 12 Ch. D. 361), it being alone lost by the appointment of a receiver occasioned by the misconduct or consent of the executor.

In all cases of death before 1st Nov. 1875, and in all after (excepting those of persons whose estates are administered by the Court¹), in regard to debts bearing interest,² interest is reckoned (at the rate they bear) up to

¹ Creditors are here entitled to interest only up to the date of judgment for administration. *In re Summers*, 13 Ch. D. 136.

² **Interest on debts.**—Bills of exchange, promissory notes, all debts where it is the custom of the trade, or where there is a special agreement, carry interest;

and by 3 & 4 Will: IV. c. 42, ss. 28, 29, interest may be allowed on any debt payable at a certain time by virtue of a written instrument from the time when payable, or if payable otherwise from the time of a written demand, giving notice that interest will be claimed.

the day of payment, and as to other debts from the date of judgment, at four per cent. (Cons. Ord. 42, R. 9). Those which by law carry interest are paid first in the order of administration.

If the deceased had a foreign domicile, the rule is that the priority amongst English creditors is regulated by the English rules of administration (*Cook v. Gregson*, 2 Dr. 286.) The executor or administrator of property here must pay the debts owing over here before he transmits any assets to the foreign representative for distribution abroad.

Against
whom
adminis-
tration
actions are
brought.

An action for administration is brought against the legal personal representative, except in the two following cases :—

1. Where the complete administration of the estate has been under the authority of the Court, for this discharges the personal representative.
2. Where distribution is made under 22 & 23 Vict. c. 35, s. 29, which provides that if executors give the notices which the Court gives in an administration suit, they shall be exempted from all liability.

In both these cases any subsequent creditor must follow the assets to be paid ; in other cases, the personal representative remains liable to a creditor, although he knew nothing of his claim at the time of distribution.

Also, if a creditor solely seeks to follow the assets, according to the decision in *Hunter v. Young*, 4 Exch. Div. 256, he need not make the personal representative a party.

There are two forms of orders for an account which may be obtained against a personal representative. The first is the ordinary account of the assets which have come into his hands, and the second, which is only required when there is a presumption of misconduct on his part, is to account not only for what he has actually

received, but for what he ought to have received, had it not been for his wilful default.

Other forms of relief against executors depend upon the nature of the case, as where they have employed the testator's money in trade, in which case the profits realized may be taken in way of interest.

When a person dies having various descriptions of property the order of application is as follows:—

After realty is taken to satisfy special charges upon it, in accordance with the provisions of Locke King's Acts (see the author's "*Real Property*," p. 40).

i. Order of application of properties for payment of debts.

1. Pure personalty is first applied for the payment of debts, being embraced in the term legal assets, that property to which the personal representative becomes entitled "*virtute officii*;" property is legal assets indifferently, whether he has to resort to a Court of Law or Equity for that purpose. Lapsed residuary personalty is taken, *pari passu*, with residuary personalty which has not lapsed (*Fenton v. Wells*, 7 Ch. D. 33), though this was once subject to doubt.

2. Realty devised on trust to pay debts (being equitable assets), together with its mesne rents and profits.

3. Realty descended.

4. Realty or personalty charged to pay debts (being equitable assets), although part of it has lapsed to the heir by the death or incapacity of the devisee to take (*Scott v. Cumberland*, 18 Eq. 578).

5. Money which the executor has set apart to pay pecuniary legacies.

6. Demonstrative and specific legacies and devises and residuary devises *pro rata*.

7. Property over which the testator had a general power of appointment which he has exercised.

8. Paraphernalia.

9. Donatio mortis causa.

As frequently creditors will not wait until the different

assets can be made available in their order, a property of a higher class has often to be taken before a lower one; in which case the person entitled to the higher one is refunded from the lower property when it is obtained, and he can also obtain a rateable contribution from a beneficiary of equal degree.

If the heir or devisee has disposed of the property before decree he still remains personally liable.

ii. Title by occupancy. Acquisition by taking possession of anything which has not an owner is the primitive way of acquiring property, but it rarely occurs now in this country, there being few things without an owner.

1. Unclaimed moveables in the earth or sea belong to the finder.

2. Game killed by anybody without permission on another's land vests in the owner of the land (1 & 2 Will. IV. c. 36.) (*Blades v. Higgs*, 34 L. J. C. P. 286.)

Subject to the game laws, animals *feræ naturæ* belong to the person who catches or tames them.

3. Goods belonging to an alien enemy vest in the captor by the common law, the alien enemy being unable to sue to recover them. This title prevails even against a former British owner from whom the goods have been previously taken by the same alien enemy. But at the present day the goods of subjects of countries with whom war breaks out are allowed to be removed or put under the protection of neutrals. Private property on land remains untouched during hostile occupancy, and private property taken at sea vests in the Prize Court.

iii. Title by invention *Eg.*, the right acquired by obtaining letters patent and copyright (*see p. 11*).

iv. Title by contract. Where a contract is completed, whatever is the subject of the contract passes by the completion. There are many kinds of contracts, as to which the reader is

referred to the *author's "Outline of Contract."* Space only affords scope here for mentioning the contract of sale, which is most immediately connected with the subject of personal property.

Sale is a transmutation of property for a *money price*, Contract of sale. therein differing from exchange, in which the consideration is not money but some other sort of commodity.

In order to transfer the property and give a good title the vendor must—

- (i.) Sell according to the formalities required by law.
- (ii.) Have in himself the true property to transfer.

A sale is effected by **deed** or **parol**. The former chiefly occurs where one party conveys his entire property to another. The transfer is effectual from the delivery of the **bill of sale**, *i.e.*, the deed.

A parol sale according to the common law takes place by an agreement, completeable *in præsenti* provided there is tender, part delivery, or something given in earnest, which may be the merest trifle (if the parties separate without any of these such separation is an implied mutual rescission), and such is still the law if the value of the goods is under £10. If the agreement is to be completed *in futuro*, which it may be if the delivery or the payment or both are postponed; then, if nothing remains to be done on the part of the seller before delivery, the property in the goods passes to the buyer, and that in the price to the seller; if anything remains to be done the property does not pass till then. But if the completion of the contract is not contemplated to be within a year, the contract will not be enforceable at law, unless it is in writing, signed by the party to be charged, or his agent (*Stat. Frauds*, s. 4).

As to goods of or over £10 in value (9 *Geo. IV. c. 14*, s. 7), the *Stat. Frauds*, s. 17 (*see the author's work on Contracts as to this Act*, p. 204), provides that no contract for the sale of them shall be valid unless the buyer—

1. Actually receive and accept part of the goods, or—
2. Give something by way of earnest to bind the bargain, or in part payment, or—
3. Unless there is some note or memorandum in writing signed by the parties or their agents.

Lord Tenterden's Act (9 *Geo. IV. c. 14, s. 7*) extends this to goods not actually made or fit for delivery, or intended to be delivered at a future time.

These are the requisites to pass the property by sale. The price need not be fixed, as it is presumed to be reasonable, or it might be agreed to be determined by subsequently weighing, or in any other way; nor need the goods be delivered, for the vendor has a lien of them till paid.

When a person having the property cannot give a good title.

A person having the property in goods may give an indefeasible title, unless there has been an actual seizure of them by virtue of a writ of execution, provided the sale is *bonâ fide*, and the purchaser had no notice of the writ remaining unexecuted in the hands of the sheriff (19 & 20 *Vict. c. 97, s. 1, Merc. Law Amendment Act*).

When a person not having the property can give a good title.

A person not having the property cannot give a better title than he has, except—

1. When the subject is money or a negotiable instrument—as a bill of exchange, or promissory note not specially indorsed, or a cheque not marked “not negotiable,” for these pass from hand to hand as money. However, the purchaser will not have a good title even then if—
 1. He has been guilty of *mala fides*, and
 2. The subject can be identified.
2. When he is an agent selling by authority of his principal.
3. When he is a certain kind of agent, as a factor—who can sometimes sell by virtue of Act of Parliament—or by the custom of various trades.
4. When he sells by virtue of a power conferred

by law, as a sheriff selling by exigency of a writ of execution.

5. When he sells in market overt goods which he professes to trade in (*Taylor v. Chambers, Cro. Jac.* 68).

Market Overt means open market, and that is **Market overt** on the spot wherever markets or fairs are held by charter or prescription on market days in the country, and in the city (not other parts) of London, every day but Sunday during market hours.

But even a sale in market overt does not give the purchaser a title—

1. If the buyer knew that the goods were not the seller's, or was guilty of any fraud.
2. If the goods were the Sovereign's property.
3. If the sale took place in a back room or concealed place—for the goods must be publicly exposed for sale—or—
4. Between sunset and sunrise, or—
5. Where the treaty was begun out of market overt (*Sm. Merc. Law, c. 12*).
6. If the vendor is a pawnbroker.
7. If the subject-matter is a horse which has been stolen; for then the owner can at any time subsequently reclaim his property, unless the sale has been made with certain formalities laid down by 2 *Ph. & M. c. 7*, and 31 *Eliz. c. 12*; and he can get it even then if in six months he proves before a magistrate that the horse was stolen, and tenders the amount paid (*See Gibbs' Case, Owen, 27*).
8. If the sale is by sample.
9. If the goods (not being valuable securities paid for or discharged *bond fide* by the person liable, without suspicion of the theft) have been stolen, and

the true owner has prosecuted the felon to conviction; for here of the two innocent parties, the prosecutor is preferred, as having rendered a greater service to the public.

Warranty. Goods may be warranted. A warranty is a guarantee from the seller that the article is of a particular kind or quality.

An **express warranty** may be made by words expressive of that intent, and, indeed, any affirmation by the vendor is a warranty, if apparently so intended; statements of ownership are warranties of title. A warranty does not extend to patent defects.

Warranties are sometimes **implied**, *e.g.*,

by the custom of trade (*Morley v. Attenborough*, 3 *Exch.* 500);

by the fact of a sale in an open shop (which implies a warranty of title);

by the fact of the articles having to be made for a particular purpose (which implies a fitness for that purpose);

by the fact that an examination is impracticable at the time of sale (which implies that they are merchantable);

by being sold by sample; that the sample corresponds with the bulk.

v. Title by gift.

If tradition of a chattel is made by a person with the intention of transferring the possession, or if actual tradition is impossible owing to its bulk or nature, the tradition may be constructive, as giving the keys of a warehouse.

A gift may be made without present delivery—

1. When the donee has already possession of the chattel as a bailee or otherwise, and he is told to keep it.
2. When the gift is evidenced by deed.
3. When the donor declares that he holds the chattel

in trust for the donee, the trust then being completely created, equity will see that it is carried out; but in no other cases, for the donee could not come into a Court of law to enforce a contract or promise to give for want of consideration, nor into a Court of equity, because it will never assist a volunteer.

Besides gifts *inter vivos* there are also gifts in contemplation of death.

A **donatio mortis causa** is a gift to take effect on death and made in contemplation of it. Its peculiarities are— *Donatio mortis causa.*

1. That the subject must be delivered to the donee or his agent;
2. And, therefore, can consist only of such things as admit of actual or constructive delivery.

(1) It is revocable during the donor's lifetime; (2) it can be made by a husband to a wife; and (3) is subject to legacy duty and debts—thus resembling a legacy.

(1) It requires no assent of the executor to perfect it; and (2) requires no probate, and therefore is exempt from probate duty—thus differing from a legacy.

A **bill of sale** is an instrument of assignment, by which goods and chattels are transferred from one person to another without actual delivery. It is rarely requisite except for a gift with deferred possession or a mortgage. It need not be by deed unless it is a voluntary transfer. *Bills of sale.*

The law on this subject is now regulated by the Bills of Sale Act of 1878 (41 & 42 *Vict. c. 31*).

The term bill of sale includes—inventories of goods with receipt attached, or receipt for purchase moneys of goods—and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to personal chattels shall be conferred—and instruments which, by way of security, give a power of distress, but not assignments for the benefit of creditors and marriage settlements.

A bill of sale must be registered in seven days and renewed every five years, or it will be void against trustees in bankruptcy and execution creditors, so far as property in the apparent or real possession of the grantor is concerned. No registration is required for the assignment of a bill of sale. If there are two or more bills of sale over the same goods they take priority in the order of their date of registration. Any subsequent bill of sale executed within seven days of an unregistered bill of sale for the same debt between the same parties is void, unless proved to the satisfaction of the Court that it was given to remedy some error in the first.

Bills of lading.

If goods are sent from abroad the property in them is transferred by **bill of lading**—a written acknowledgment by the master of the ship that he has received goods from the shipper to be conveyed on the terms therein expressed to their destination and then delivered. It is transferable by indorsement (18 & 19 *Vict. c. 111*).

vi. Title by payment of value.

When a person is sued in trover or detinue, and pays the value of the chattels in question (and special damage, provided there has been any sustained), he gets a good title to them (*Ex parte Drake, L. R. 5 Ch. D. 866*).

vii. Title by pledge.

By 35 & 36 *Vict. c. 93*, a pledge pawned for 10s., or under, if not redeemed in a year (exclusive of the day of pawn) and seven days (grace), becomes the pawnbroker's absolute property. If over 10s. the pawnbroker may sell it after that time by public auction, it being redeemable till sold, and the pledgor may at any time in three years demand any surplus. For a loan over 40s. the pawnbroker may make a special contract.

viii. Title by bankruptcy.

In so small a work as this, little can be said upon so important a subject as bankruptcy; and, moreover, a new Act is in contemplation, which may materially change the law as at present existing.

Since the reign of Henry VIII. traders unable to pay their debts have been liable to the bankrupt laws, *i.e.*, to have their property distributed amongst their creditors. The Act of 1861 first made non-traders liable to bankruptcy. This Act was, however, repealed by the Act of 1869 (32 & 33 *Vict. c. 71*), the objects of which Act are to provide means whereby—

1. A debtor may obtain a discharge from his debts, and start again.
2. Creditors may obtain an equal division of his property.
3. A fraudulent debtor may be punished by imprisonment.

Companies (for these are wound up, *see* p. 21), infants and married women (except in a few cases) alone cannot be bankrupts. A person may be made a bankrupt if (i.) he has committed an act of bankruptcy, and (ii.) he is indebted to the extent of £50 or more to one or several persons. The Act defines what acts are considered acts of bankruptcy, and a distinction is drawn here (and also in other parts of the Act) between traders and non-traders;¹ there being certain acts which if committed by a trader constitute an act of bankruptcy, as departing from his dwelling-house, or otherwise absenting himself, whereas if committed by a non-trader they do not do so.

Proceedings are commenced by petition alleging the act of bankruptcy, which must be committed in the previous six months; the bankruptcy does not date from the order of adjudication, but from the date of the earliest act committed in twelve months before that time.

¹ The Act enumerates what persons are to be considered traders; it includes all those persons who live by continually buying and selling. Thus, a

solicitor is not a trader, unless he is in the habit of investing his client's money and charging a commission for so doing, besides his professional charges.

Creditors then meet, prove their debts and appoint a trustee (in whom the bankrupt's property vests), and also a committee of inspection to supervise him.

There are certain acts which the trustee may do on his own account—*e.g.*, to carry on the business of the bankrupt, bring and defend actions—and there are certain acts which he cannot do without the consent of the committee of inspection, as to refer matters to arbitration.

All debts may be proved (excepting demands in the nature of unliquidated damages arising from tort unconnected with contract), present or future, certain or contingent, to which the bankrupt is subject at the date of adjudication, or to which he may become liable, during the bankruptcy, in respect of any obligation incurred before adjudication.

All the bankrupt's passes to the trustee except—

1. Property acquired by his personal labour during the bankruptcy.
2. Claims for personal wrongs.
3. Property held as trustee for others.
4. Tools of his trade, wearing apparel, &c., not exceeding £20.
5. Offices which cannot be sold, pay of persons employed by the Crown, &c.

A distinction is again here drawn between a trader and a non-trader. Thus, goods and chattels in his possession, order, or disposition, at the commencement of the bankruptcy, with the consent of the owner, and of which he (the bankrupt) is reputed owner, except choses in action, are, if he is a trader, held to be his property for the purposes of the Act (*see p. 6*).

The trustee may disclaim unprofitable property as—land subject to onerous covenants—unmarketable shares in companies, and unprofitable contracts.

All debts are payable, *pari passu*, excepting the following, which are preferential:—

1. Those secured (*see p. 80*), the creditor having the privilege of either—
 1. Resting on his security.
 2. Realizing it, and proving for the residue.
 3. Throwing it up, and proving for the whole debt.
2. One year's rates and taxes due at the adjudication.
3. Four months, or less, clerks' or servants' wages, not amounting to over £50, and two months' or less labourers' wages.
4. The landlord, if he has put a distress in (i.) before the bankruptcy, may distrain for six years' arrears, or less; (ii.) if after, for one year's arrears, or less.

The bankrupt may apply for his discharge—

(i.) If he has paid 10s., or more in the pound.

(ii.) If the creditors by special resolution have agreed to discharge him;

but the Court may withhold the discharge on proof of his fraud, &c.

If he be not discharged, no debt under the bankruptcy can be enforced for three years after the bankruptcy is closed; and then, subject to the right of subsequent creditors, any balance may be enforced, by leave of the Court, as a judgment debt.

The creditors, by special resolution, may determine that the debtor's estate be wound up by liquidation by arrangement, to which the provisions of the Act relating to bankruptcies generally apply, excepting those dealing with the close of the bankruptcy, the trustee's release, and the audit of accounts. Liquidation by arrangement.

The creditors by extraordinary resolution may accept a composition in satisfaction of their debts, which composition binds those creditors only whose debts are shown in the debtor's statement; if the composition provisions are Composition.

not complied with the creditors may apply to have it enforced, or act as if there had been no composition at all.

A **special** resolution is one passed by a majority in number, and three-fourths in value, of the creditors at a general meeting, and if it is confirmed by a majority in number and value at a subsequent meeting, held between seven and fourteen days after, it is an **extraordinary** resolution.

CHAPTER X.

SETTLEMENTS.

THE subject of settlements falls under the headings of ^{Kinds.} title by gift, testament and purchase. By settlement property is given to trustees to be dealt with as the settlor directs. As previously mentioned (p. 44), this is the only way in which chattels can be limited to several in succession. Settlements are (i.) voluntary, which occur (α) where the settlor (while living) of his own accord gives property to trustees to hold for certain persons (β) by will; (ii.) for value—as marriage settlements.

The manner in which the legal estate in personalty is vested in trustees depends upon its nature. Thus, ^{Legal estate, how vested in the trustees.}

If it is money secured on mortgage—by a transfer of the mortgage on the trusts of the settlement, the settlement itself declaring the trusts being by a separate deed.

If it is shares, &c., in companies—by the usual transfer.

If it is stock—by transfer at the bank to the trustees, by power of attorney or personally.

If it is furniture—by assignment, the trusts being afterwards declared.

If it consists of negotiable instruments—by indorsement to the trustees, the fact of the indorsement being recited in the settlement.

If it is a policy of assurance—by assignment upon trust after the receipt of the money to invest it, and apply the investment as directed by the settlement.

Formerly choses in action were not capable of legal transfer, in which case the settlor must have done all in his power to make the assignment complete, but this difficulty is now removed by J. A. 1873, s. 25 (*see p. 33*).

Voluntary
settle-
ments.
Ellison v.
Ellison,
1 W. & T.
Cas.

A settlement must be perfectly created, if voluntary, of which a post-nuptial settlement is an instance, though the form of words is immaterial (*Harding v. Glyn*, 2 W. & T. Cas.); that is, the property must be conveyed to the trustee in the manner recognized by law, for equity will afford no aid against the settlor at the instance of a volunteer to make him (the settlor) finish the transfer of the legal estate to the trustee; but a person may declare himself a trustee of pure personalty for another by word of mouth, and if he is himself a *cestui que trust* he may even verbally direct the trustees to hold for a third person, and a valid trust for that third person is created (*McFadden v. Jenkins*, 1 Ph. 153). Also, if a *cestui que trust*, he may assign his equitable interest directly to another (*Kekewich v. Manning*, 1 De G. M. & G. 176).¹

If, however, the trust is complete, it is binding on the settlor and irrevocable unless—

1. There is a power of revocation, which it is always advisable to insert, and a voluntary settlement may be set aside if the settlor was ignorant that such a power might be inserted (*Phillips v. Mullings*, L. R. 7 C. A. 244).

2. The settlement is for the benefit of the settlor as a conveyance of property to trustees to pay the settlor's debts (*Garrard v. Lord Lauderdale*, 3 Sim.), provided

¹ Besides trusts being expressly created, the intention of a person to constitute himself or another a trustee may be gathered from his conduct (*see Penfold v. Mould*, L. R. 4 Eq. 562). Those cases in which equity fixes a trust on a man as to property owing to the presumed but unexpressed inten-

tion of another who gives it him being termed implied trusts. And there are also cases in which equity considers a person a trustee independently of and sometimes against the intention of the parties, such trusts being termed constructive (*Keech v. Sandford*, 1 W. & T. Cas.).

the fact of the settlement has not come to the knowledge of the creditors (*Field v. Donoughmore*, 1 D. & W. 227).

A voluntary settlement, if made in fraud of present creditors, is void against them (13 *Eliz. c. 5*), though not against subsequent creditors, unless it can be shown that the design was to defraud them, as where the money lent by them was devoted to pay off previous creditors (*Freeman v. Pope*, L. R. 5 Ch. 538). It is a matter of evidence as to whether the creditors were intended to be defrauded (*Twynne's case*, 1 Sm. L. C.). (See the author's "Outline of Contract," p. 262.)

By the Bills of Sale Act, 1878 (41 & 42 *Vict. c. 31*), bills of sale are void against trustees in bankruptcy, general assignees and execution creditors, unless registered in seven days, and re-registered every five years as the Act prescribes.

By the Bankruptcy Act, 1869 (32 & 33 *Vict. c. 71, s. 91*), a voluntary settlement by a trader is void if made in two years before bankruptcy—and also if made in ten years before bankruptcy, unless the settlor can show that he was solvent when he made it. This section includes property settled in pursuance of ante-nuptial agreement, unless it is acquired and settled before bankruptcy, but not property which has accrued to the settlor through his wife during coverture.

An ante-nuptial settlement being for value can be enforced, though not complete; or even a post-nuptial settlement in pursuance of an ante-nuptial agreement, however slight the consideration (*Hewinson v. Negus*, 16 *Beav.* 594). There must, however, be some consideration flowing from the wife; thus if she has previously lived with the husband there is none (*Columbine v. Penhall*, 1 Sm. & G. 228).

A covenant to settle after-acquired property accruing to the wife embraces property coming from any source,

whether contemplated in the settlement or not. But it will not include—

1. Any property which is shown to have been intentionally left out (*Hoare v. Hornby*, 2 Y. & C. N. C. 121).
2. Property which comes to her for her separate use, unless she is a party to the settlement (*Coventry v. Coventry*, 32 Beav. 612), she not being bound by the husband's covenant to settle such property (*Dawes v. Tredwell*, 44 L. T. 740).
3. Property falling into possession after the coverture, as a reversionary interest (*Re Jones' Will*, L. R. 2 Ch. D. 302).

The trusts in marriage settlements are generally as follows :—

If the property is the husband's, a first life estate¹ is given to him, or if he is in business an interest terminable on bankruptcy in favour of the wife or to the trustees for the maintenance of the children. If the property is the wife's, a first life interest is given to her for her separate use, free from the debts and control of her husband, and without power of anticipation. On the death of husband or wife, in both cases above, a life is given to the other, and on the death of the survivor the fund will be held upon trust for such one or more of the children as the husband and wife shall jointly by deed appoint;² and in default of any joint appointment, as the

¹ If a person entitled for life dies before his income—payable at fixed periods—becomes payable, by the Apportionment Act, 1870 (33 & 34 Vict. c. 43), the proportional part is recoverable by his representatives at the time when the whole should be paid. The only cases in which there is now no apportionment are—

1. When the instrument giving

the income forbids it.

2. In policies of insurance.

² If the power is to appoint amongst younger children, the term means all those who do not take the family estate. Thus it would include the eldest daughter. As to powers, their efficiency, peculiarities, and advantages, see the author's "*Concise Abridgment of Real Property*," p. 112.

survivor shall by deed or will appoint, and in default of such appointment upon trust for the children of the marriage equally, the issue of a deceased child taking the share the parent would have been entitled to if living. The interests of the sons should vest at twenty-one, and of the daughters at that age, or marriage.¹ Then follows the hotchpot clause, inserted to equalize the shares, to the effect that any child taking a share under an appointment cannot share in the part unappointed without bringing the appointed share into hotchpot—that is, dividing it amongst those to whom no appointment has been made.² In default of any of the children taking a vested interest, then, if the property is the husband's, it is settled on

¹ **Children's portions** can either:

1. Be vested in them, being sons at twenty-one or daughters at twenty-one, or marriage; in which case there should be provision for maintenance until that period; for the Court only directs maintenance if the persons ultimately entitled (*Turner v. Turner*, 4 Sim. 430) agree, or the whole property ultimately goes amongst the children (*Errat v. Barlow*, 14 Ves. sen. 202), the settlement being made only by a person *in loco parentis*. However, Lord Cranworth's Act (23 & 24 Vict. c. 145, s. 26) allows trustees at their discretion (uncontrolled in any case) to apply for maintenance all or part of the income to which an infant may be entitled, of property to be his, absolutely or contingently, at twenty-one or sooner; and they may apply it, although he will not be entitled to the income until he comes of age (*Re George, C.A.*, L. R. 5 Ch. D. 837).

The father is primarily liable to maintain his children if he can, although there is another fund; and the Married Woman's

Property Act, 1870, also makes the mother liable out of her separate estate, but not so as to exonerate the father. An express direction will, however, make a settled fund applicable for that purpose.

2. Be vested in them on birth, divesting proportionally in favour of others when born, and totally on the decease of sons under twenty-one and daughters under twenty-one or marriage. Here there is no necessity for a direction for maintenance, the father being dead.

² No appointment can be made to the representatives of a deceased child, that being an excessive execution of a power; therefore such representatives will benefit by the **hotchpot clause**, they taking a proportional part of the fund brought into hotchpot, or taking more than they would otherwise have done if the children to whom appointments have been made do not elect to surrender their appointed shares, and become excluded from the part unappointed.

trust for his executors, administrators, and assigns;¹ if the wife's, and she predecease her husband, upon trust as she shall by deed or will, notwithstanding coverture, appoint; in default of appointment for her next of kin, and if she is the survivor, for her executors, administrators, and assigns. There should also be a clause enabling the trustees to apply a portion of the income of the share of any infant for purposes of maintenance and education, accumulating the surplus income, and also a power of advancing a portion of the capital for the preferment of the infant in life.

There should further be a provision if the property is the wife's, enabling her to settle some part of it on the children of a second marriage, or the property may be settled generally on the children of the wife. Formerly a power of appointing new trustees was necessary in settlements, but now 23 & 24 Vict. c. 145, s. 27 (applying to instruments executed after 28th August, 1860,) provides that when any trustee shall die, or desire to be discharged from, or refuse, or become unfit, or incapable to act in the trusts, the persons nominated for that purpose in the instrument creating the trust, or if there are no such persons, or none able or willing to act, then for the surviving or continuing trustees, or the personal representatives of the last one, or for the last trustee by writing to appoint a new trustee, and the trust property shall with all convenient speed be legally assigned to him solely or jointly with the rest, as the case may require, and he shall have the same powers, &c., as if he had been

¹ It is usual, when giving personalty to a man, to add the words, "and to his executors, administrators, and assigns." But this is mere verbiage, in nowise enlarging the interest of the donee, or giving anything to the personal representatives in their own right. Indeed, if given in

trust for him for life, and then to his executors, administrators, and assigns, he will still get the whole (*Page v. Soper*, 17 Jur. 851: compare the rule in *Shelley's case in Real Property, Tud. Conv. Cas.*), though conceivably if assigns is omitted he may not (*Alger v. Parrott*, L. R. 3 Eq. 328).

originally nominated a trustee. This meets almost every contingency likely to occur. Also the clause declaring the receipts of trustees good discharges for the trust-money need not now be inserted, 22 & 23 Vict. c. 35, s. 23, and 23 & 24 Vict. c. 145, s. 29, exonerating persons paying money to trustees from seeing to the application thereof.¹

Although equity infuses an indemnity clause for the protection of trustees into every trust deed, yet it is usual to insert an express provision that one shall not be answerable for the receipts, acts and defaults, &c., of the rest. Also, by 22 & 23 Vict. c. 35, s. 31, every trust deed shall be deemed to contain the usual indemnity and reimbursement clauses.

Note, however, that the clause does not extend to the neglect of a trustee's duties, of which looking after the rest is one.

1. Fraud on marital rights (*see p. 59*).
2. A condition in a gift to a wife living apart from her husband that the gift shall cease on re-cohabitation is void (*Wren v. Bradley*, 2 De G. & S. 49).
3. A condition in a gift to a woman avoiding the gift on marriage without the consent of certain

Illegal settlements and conditions as to marriage.

¹ It was an early doctrine of equity that the purchaser from a trustee or devisee, subject to a charge, must see to the application of the purchase money, or he would be liable if the trustee or devisee did not apply it to the proper quarter; unless—

1. The trustee had power to give a receipt by the instrument of trust; or
2. The trust was for the payment of debts or legacies generally.

And this is still the law as to instruments executed before Aug. 13, 1859, and Aug. 28, 1860 (as to selling under powers); as to others,

22 & 23 Vict. c. 35, s. 23, provides that the *bond fide* payment to and receipt of a trustee for purchase or mortgage money shall discharge a purchaser. 23 & 24 Vict. c. 145, s. 29, extends this exoneration to the receipts in writing for any money, by virtue of the trustees exercising any trusts or powers vested in them.

Also ss. 14, 16 of the former Act provide that the trustee is to sell when the whole interest in an estate, subject to a charge, is devised to him—and the executor is to sell in such a case when a partial interest only is given to the trustee.

Elliott v. Merryman, 1 W. & T. Cas.

persons is void, as being "*in terrorem*" merely, unless there is a limitation over to another on such marriage (*Bellasis v. Ermine*, 1 Ch. Ca. 22).

4. A condition in a gift that a person shall not marry is void, but if so worded that the donee shall retain the property while single, and that it shall pass into another channel on marriage it is good.
5. A provision in a marriage settlement relating to future separation is invalid, though such agreements when the separation becomes a *fait accompli* are upheld.

**Divorce
and sepa-
ration.**

On divorce or a decree for nullity the Court may review settlements, and make such provisions for the parties or their children as it pleases (22 & 23 Vict. c. 61, s. 5); and also for the maintenance of the latter. 41 Vict. c. 19, gives the Court power to review settlements, whether there are children by the marriage or not.

On divorce or a decree for judicial separation the Court may decree alimony (a separate maintenance) to the wife for life (20 & 21 Vict. c. 85, s. 32); and also can make settlements out of her property, when guilty of adultery, on the husband and children (20 & 21 Vict. c. 85, s. 45).

Any settlements made by the husband on a voluntary separation are merely voluntary deeds, and become inoperative on recohobitation.

**The
trustee.**

A **Trustee** should be a person—

1. Capable of taking and holding the legal estate ;
2. With capacity and ability to execute the trust, and
3. Domiciled in the jurisdiction of the Court of equity.

Corporations, infants, married women, &c., are not incapable, but unfit to be trustees.

**His
position.**

The position of the trustee may be summed up as follows :—

1. He cannot renounce after acceptance, though he

may disclaim beforehand,¹ and may alone be discharged by—

- a. Consent of all parties interested, being *sui juris*.
 - β. Virtue of a special power in the instrument of trust.
 - γ. Sanction of a Court of equity.
2. He cannot delegate his office—being himself a delegate—the sole exceptions being, earnest necessity or regular course of business.
 3. He and every other person in a fiduciary position, *e.g.*, as an agent, may not benefit, directly or indirectly; his time, his trouble, must be given gratis; every advantage he has gained by his skill, or otherwise, must be given up (though he is responsible for loss owing to his laches), and the Courts watch him so jealously, lest by his influence over his *cestui que trust* he may obtain some advantageous bargain, that they will only allow him to buy from his *cestui que trust* when—
 1. He will give a fancy price, or—
 2. The sale is by public auction, he having leave to bid, or—
 3. The *cestui que trust*, standing at arm's length, asks him, he paying a fair price.
- He may, however, stipulate for compensation for his trouble with the *cestui que trust*, and if a solicitor, may charge for services strictly professional if there is a clause in the instrument of trust permitting this, and anyhow he can charge for costs out of pocket.
4. He must carry out the directions of the settlor, and promptly take care of the trust funds; that is, get them into possession, or endeavour to do so,

¹ When personal property is bequeathed upon trust to executors, the probate of the will is on acceptance of the trust.

as far as possible, and place them in a state of security ; convert any residue of a reversionary nature, or personalty of a wasting nature not included in a general residuary devise ; leave nothing outstanding on personal security ; in fact, deal with and invest the property as directed by the Court.

Power should be given to the trustees, with the consent of the tenant for life, to invest in land (and to lease, if necessary, such land when purchased), the purchased land being still considered as money, and subject to the trusts of the settlement, and to sell the purchased land with the same consent.

It is generally the practice to require the consent of the life tenant to be given before an investment can be changed, in which case a subsequent assent is nugatory ; and sometimes the instrument of trust may be so worded as to oblige the trustees to do it at his request ; though, as a rule, the trustees have also a discretion.

Invest-
ments.

If trustees or executors directed to convert and invest in Government or real securities neglect to do either, they are answerable for the principal and interest, and the *cestui que trust* cannot elect to take the stock and dividends that might have been bought.

A trustee may only invest in the following securities, unless otherwise authorized by the instrument of trust, and in these he may not invest if forbidden :—

Stock of the Bank of England or Ireland, or East India stock, or real security in any part of the United Kingdom (22 & 23 *Vict. c. 35, s. 32*), Parliamentary stocks, public funds and Government securities, and to vary the same (23 & 24 *Vict. c. 145, s. 25*) ; but if there is a person entitled to receive the income for a term of years terminating with life, or for a greater estate, his consent in writing must be had for such variation or original investment, except in the Three per Cent. Consolidated Annuities.

The Court of Chancery may issue general orders as to the investment of cash subject to its jurisdiction (23 & 24 *Vict. c. 38, s. 10*), and trustees, executors, &c., having power to invest in Government security or Parliamentary stock, funds or securities, may invest in any of the investments in which cash may be invested under such order of the Court (*s. 11*); and by a general order in pursuance of this authority (1 *Feb.* 1861), such investments may be made in Bank stock, East India stock, Exchequer bills. Two and a Half per Cent. Annuities, and mortgages of freeholds and copyholds in England and Wales, as well as Consolidated Three per Cent. Annuities, and also the Reduced and New Three per Cent. Annuities.

They may further invest in East India stock created after 22 & 23 *Vict. c. 35*, in any securities the interest of which is guaranteed by Act of Parliament (30 & 31 *Vict. c. 132, s. 2*), and in Consolidated stock issued by the Metropolitan Board of Works (34 & 35 *Vict. c. 47, s. 13*).

If they have a power to invest in mortgages or bonds of railways, or of any other company, they may, unless forbidden, invest in the debenture stock of such company (34 & 35 *Vict. c. 27*).

When they lend on mortgage they should look to the sufficiency of the value and the title of the borrower, who must not be one of themselves. Second mortgages are forbidden without express authority.

If authorized to invest in real security, they may, by the Improvement of Land Act, 1864 (27 & 28 *Vict. c. 114*), invest in the charges authorized by that Act, or mortgages thereon (*s. 60*).

5. He is not liable for the acts of his co-trustees unless he has allowed money to remain too long in their hands, or somehow not been on the *qui vive* to see what they have done with it. In fact, he must look after them, or he is responsible.

Townley v. Sherborne first decided this, and also, on the *Townley v.*

Sherborne,
2 *W. & T.*
Cas.

above principle, that a trustee signing receipts was liable for the misapplication of the money, although he had received nothing. The rule, however, now is that a trustee signing for mere conformity shall not be liable. It would be unfair were it otherwise, considering that every trustee must sign in matters concerning the trust; but the *onus* is thrown on him of showing that he did not receive, and he must be careful not to let the money remain longer than necessary in the hands of the others, or he will not be exonerated.

Executors stand on a different footing in this respect to trustees. They need not all sign receipts; one alone can do all necessary acts without involving the rest, so that they therefore need not look after one another. If a non-acting executor signs, it is his voluntary act and his own fault; but even in his case, if the receipt be given for mere form, he will not be charged (*Westley v. Clarke*, 1 *Eden*, 357).

Rights of
cestui que
trust.

The rights by which the *cestui que trust* is supported against the accidents to which an estate transmitted through the instrumentality of another is exposed, are—

1. That his estate shall never fail for want of a trustee. When the trust is duly created, and there is no trustee appointed, or if there is one appointed and he dies, disclaims, or cannot take, equity will not allow it to be defeated, but will fasten it on the conscience of the person on whom the legal estate has devolved (unless he is entitled to its protection as a *bond fide* purchaser for value without notice), to deal with it according to the rules of equity, from which he deviates at his risk. If no trustees are appointed, the Court will assume the office itself at first.
2. To prevent a breach of trust—the *cestui que trust*
 - (a) is entitled to have the estate given to persons fit in themselves and in their number, and in the event of their becoming

unfit, as on a *feme* trustee marrying, he may have the old trustee removed and a new one appointed; and by the Trustee Act, 1850, the Court will appoint, whenever it is inexpedient to do so, without its assistance;

(β) may compel the trustee to perform any act of duty, as to lend his name to enable the *cestui que trust* to sue; and the *cestui que trust*

(γ) can restrain them from violating their duty.

3. If a breach of trust has been committed, and the trust estate alienated, the *cestui que trust* may

i. Follow it and take it out of the hands of anybody, excepting a purchaser or mortgagee, for value without notice of the trust, and even out of their hands if they obtained a voluntary conveyance from the trustee after discovering the trust, although they had not notice of it up to completing the purchase; for (differently from the principle of tacking) notice of the trust makes the purchaser a trustee.

The time in which he can do this may be barred by

a. A Statute of Limitation.

β. The Court, presuming after great length of time that some act has been done which if done would bar relief.

γ. The ground of public policy—that relief would be attended by great inconvenience.

ii. Attach the property which has been substituted for the trust estate as long as the metamorphoses can be traced, which money,

for instance, cannot be when it has left the trustee's possession; and if the trust funds and the trustee's own property are blended, all will be presumed to belong to the former which the trustee cannot show belongs to the latter.

iii. The *cestui que trust* may proceed against the trustee personally

a. Criminally, for a misdemeanour under the Fraudulent Trustees' Act (24 & 25 Vict. c. 96, s. 80).

β. Civilly, for compensation. Breach of trust creates a specialty debt if the trustee has acknowledged such breach under seal, or if the acceptance is by deed, with a covenant express or implied for payment; if not, a simple contract debt. But the distinction is now totally unimportant, the Statute of Limitations not applying to express trusts, and specialties and simple contracts being paid *pari passu* (see p. 79).

The *cestui que trust* can take no steps if he concur in the breach of trust, or subsequently acquiesce or release the trustee.

A trustee or executor, when guilty of unnecessary delay in investing, is charged 4 per cent. interest. He will be charged more when he

1. Ought to have received more.
2. Has actually received more.
3. Is presumed to have received more; *e.g.*, if he has traded with the money.
4. Has been guilty of some gross misconduct.

A constructive trustee being in a position merely of quasi-contract, is less jealously watched by the Court than an express trustee. Thus

1. The Statutes of Limitations run in his favour, therefore he cannot be called to account at any indefinite distance of time.
2. He may have an allowance for skill, time, or trouble.

Several Acts have of late years been passed with a view ^{Acts relating to} of relieving trustees from the responsibility attaching to trust funds, and to secure the better administration of the property.

Thus, by the Trustee Relief Act, 10 & 11 Vict. c. 96, they and other persons having in their hands any trust moneys, on filing an affidavit shortly describing the instrument creating the trust, &c., may pay the same, with the privity of the Paymaster-General (35 & 36 Vict. c. 44, s. 4), into the Bank of England to his account, in the matter of the particular trust, and the Court may make orders, on petition, for the application of the moneys so paid, &c. 12 & 13 Vict. c. 74, allows the Court, on the application of a majority of trustees or executors, to order payment or transfer of trust moneys into Court.

The Trustee Act, 1850 (13 & 14 Vict. c. 60), empowers the Lord Chancellor to make an order vesting trust property in a new trustee or trustees whenever any existing trustee or trustees become lunatic, or are infants, or out of the jurisdiction, or unascertainable, or refuse to transfer, or are convicted of felony (15 & 16 Vict. c. 55, s. 6), or, in fact, whenever it is inexpedient or impracticable to obtain a new trustee without the assistance of the Court, and this can be done whether there are existing trustees or not; or instead of a vesting order the Paymaster-General, if more convenient, may be directed to transfer the stock to the person named in the order.

22 & 23 Vict. c. 35, s. 30, allows any trustee, executor, &c., to apply to any Judge of the Chancery Division, by petition or summons signed by counsel (23 & 24 Vict. c. 38, s. 9), for his opinion respecting the

management of the property; and provided he has been guilty of no concealment, he is protected in acting under such advice.

23 & 24 Vict., c. 145, s. 1, applying to trusts created after 28th Aug., 1860, empowers trustees to sell by auction or private contract, to exchange or buy in, to lay out the money thus arising (*s.* 8), and if trustees of renewable leaseholds, to renew, &c., unless precluded from doing so by the instrument creating the trust.

THE CONVEYANCING ACT OF 1881.

(44 & 45 Vict. c. 41.)

This important Act, which comes into force on the 1st January next (1882), though almost exclusively relating to Real Property, yet affects personalty as far as it is connected with conveyancing, thus touching some of the statutes cited in the previous chapter—*e.g.*,

Sections 31–8 re-enact sections 27–30 of Lord Cranworth's Act, 23 & 24 Vict. c. 145 (*see p.* 99), and extends it as follows:—

Section 31—

- (i.) allows new trustees to be appointed whenever a trustee remains out of the United Kingdom for more than twelve months.
- (ii.) enacts that on any appointment the number of trustees may be increased or diminished—provided that the property shall be left under the control of a sole trustee only when one trustee was originally appointed.
- (iii.) has a retrospective effect (which Lord Cranworth's Act had not) and applies to instruments creating trusts, whatever their date.

Section 32, also retrospective, provides that when there are more than two trustees, and one by deed declares that he wishes to be discharged, if his co-trustees and any other person who may be entitled to appoint new trustees by deed consent, then he shall be deemed to have retired, and shall by the deed be discharged, and there need not be any new trustee appointed.

Section 33 gives to new trustees appointed by the Court all the powers of original trustees *before as well as* after the property vests in them.

Section 34 enables trust property to be vested in new trustees by a mere declaration of the appointor under section 31, or in the continuing trustees by their own declaration under section 32.

It does not apply to deeds executed before the commencement of the Act—nor to shares or such property as is transferable in books.

Section 35, applying only to trusts created after the commencement of the Act, allows trustees having a power of sale to sell all *or any part* of the property, subject to prior charges or not, publicly or privately or how they may think fit.

Section 36 makes trustees' receipts for any money or other personalty a sufficient discharge (*see p. 100*).

Section 37 allows trustees and executors to pay or allow claims on any evidence they think sufficient, compound, take security for debts, allow time to pay, refer, and even to *abandon* a claim—(extending section 30 of Lord Cranworth's Act, which gave powers of reference, compounding, and compromising to executors only).

Section 38 allows powers given to two or more executors or trustees jointly to be exercised by the survivor or survivors.

Section 39 allows the Court, with the consent of a married woman, to bind, if for her benefit, property which she is restrained from anticipating (*see p. 59*).

Section 43 gives trustees full discretionary power of applying the income of infants' property for their maintenance, whether absolutely or contingently entitled, thus re-enacting section 26 of Lord Cranworth's Act (*see p. 98*).

Section 52 allows a person entitled to a power, whether coupled by an interest or not, by deed, to release or contract not to exercise it.

Section 60 enacts that obligations entered with two or more jointly shall enure for the benefit of the survivor or survivors.

It may be noted that sections 31, 32, 37, 43, 52 are retrospective, and section 38 applies to instruments coming into force after the commencement of the Act.

Sections 31, 32, 35, 37, 38, 60 are subject to any contrary intention in the instrument of trust.

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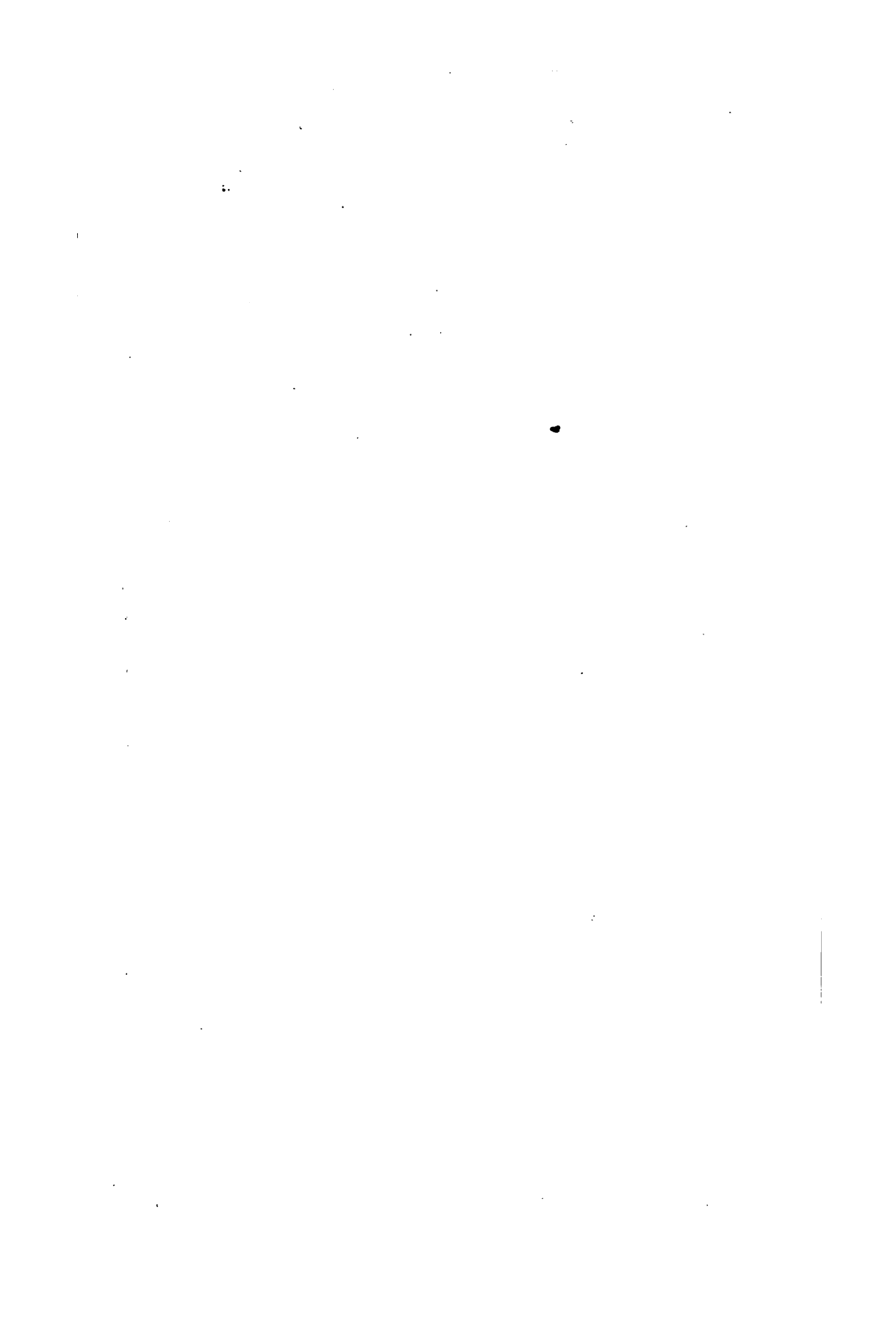
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